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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ENERGY RESERVES GROUP, INC., *et al.*,
Petitioners,

v.

JAMES B. EDWARDS, SECRETARY OF ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether an administrative agency's construction of a statute is entitled to judicial deference when the agency, in the absence of notice and opportunity for public comment, promulgates a regulation without attention to the specific issue of statutory construction and then, again in the absence of notice and opportunity for public comment, adopts an "interpretation" based solely upon the language of its earlier regulation and without any consideration of the statutory language, congressional purpose, regulatory history, or relevant factual background.

2. Whether oil wells of the type commonly referred to in the industry as "injection wells" must be excluded from the calculation of "average daily production" in applying the statutory exemption from price controls for crude oil produced from properties whose "average daily production . . . does not exceed ten barrels per well."*

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* The petitioners before this Court were the appellees in the court of appeals, and they are listed in Appendix K, *infra*. Their parent companies, subsidiaries, and affiliates, other than wholly owned subsidiaries, are listed in Appendix L, *infra*. The respondents here, James B. Edwards, Secretary of Energy, and the Department of Energy, were the appellants in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

The plaintiffs in this multidistrict litigation hereby petition for a writ of certiorari to review the judgment of the court of appeals.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The opinion of the district court (App. B, *infra*) is reported at 520 F. Supp. 1232 (D. Kan. 1981). An earlier opinion of the district court (App. C, *infra*), granting summary judgment for the original plaintiffs, is reported at 447 F. Supp. 1135 (D. Kan. 1978). The opinion of the court of appeals reversing that judgment (App. D, *infra*) is reported at 589 F.2d 1082 (TECA 1978). The opinion of the Judicial Panel on Multidistrict Litigation consolidating nineteen separate actions for further proceedings in the district court (App. E, *infra*) is reported at 472 F. Supp. 1282 (J.P.M.L. 1979). The sub-

sequent opinion of the court of appeals denying the government's petition for a writ of mandamus to prohibit further proceedings in the district court (App. F, *infra*) is reported at 613 F.2d 305 (TECA 1979).

JURISDICTION

The judgment of the court of appeals (App. G, *infra*) was entered on July 29, 1982. The court's order denying rehearing with suggestion of rehearing *en banc* (App. H, *infra*) was entered on September 10, 1982. This Court's jurisdiction is invoked under section 211(g) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, and 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS, AND RULING INVOLVED

The pertinent statutory and regulatory provisions and administrative ruling are set forth in Appendix I, *infra*.

STATEMENT

During the period from August 19, 1973, through January 27, 1981, the petroleum industry was subject to a special program of federal price controls. Throughout virtually all of that period, however, a series of statutes exempted from price controls the first sales of crude oil produced from properties whose average daily production of crude oil did not exceed ten barrels per well. This multidistrict litigation concerns the application of the statutory exemption to secondary recovery projects that utilize "injection wells." The issue affects thousands of producers of crude oil and royalty owners and several state governments. This litigation alone directly involves more than one billion dollars. *See* App. B, *infra*, p. 39a.

1. *The nature of injection wells.* The primary recovery of crude oil utilizes natural underground pressures to drive oil to the well bore through which it is recovered.

App. B, *infra*, p. 42a. Usually only fifteen to fifty percent of the crude oil contained in a reservoir can be recovered in this manner, however. *Id.* at 43a. Further recovery requires the injection of water or other matter into the producing formation. *Id.*

> A water injection recovery system requires at a minimum two oil wells. One well is the injection well and is used as a vehicle to inject water into the oil formation. The other well is the recovery well and is used as the conduit to remove the oil forced into the well bore. Typically, an injection well is a former recovery well which has been converted to injection. Physically, there is little difference between the structure of an injection well and the structure of a recovery well.

Id. See also id. at 108a. The use of injection wells, known as "secondary recovery," is of critical importance to the domestic production of crude oil. "In 1973, approximately one billion barrels of oil were produced through the injection process. Thirty to fifty percent of all oil produced in the United States was attributable to fluid injection projects." *Id.* at 46a (citations omitted).

In the major crude oil producing states, injection wells are closely regulated by state law. In order to engage in a secondary recovery project utilizing injection wells, a producer must show that the project will increase the total recovery of crude oil from the producing field; producers must obtain permits to drill injection wells or to convert recovery wells to injection. *Id.* at 49a-52a. Once an injection well is completed, an "allowable," *i.e.*, the amount of crude oil that a well may lawfully produce, may be assigned to it by the state for proration purposes:

> . . . even if a well was drilled to be operated as an injection well, the operator must use that well as a recovery well for twenty-four hours to determine how much oil that well can recover in that period.

> The amount of oil that the well emits in that test period is assigned to that well as its allowable.
>
> When the test is completed and the wells are converted to injection wells, the allowable of those wells are transferred to other specific recovery wells on the property. Thus, if prior to injection, an injection well has an allowable of five barrels per day, and a recovery well has an allowable of six barrels per day, the allowable of the injection well can be transferred to the recovery well so that the recovery well could extract eleven barrels per day.

Id. at 50a-51a (citations omitted).

Injection wells long have been treated in the same manner as recovery wells under federal law. *Id.* at 52a-56a. The Mineral Land Leasing Act of 1920, 41 Stat. 437 (1920), as amended, 49 Stat. 676 (1935), which is administered by the Secretary of Interior, imposes standard royalty provisions for oil and gas leases on federal lands but exempts from those provisions all "stripper well leases," *i.e.*, leases whose "average daily production . . . [does] not exceed ten barrels [of crude oil] per well per day." *Id.* at 54a. Since 1936, the regulations of the Department of Interior have provided that injection wells "shall be counted as producing wells" in administering this statute. 30 C.F.R. § 221.49(b); 56 I.D. 415, 427 (1936). *See also* App. B, *infra*, pp. 54a-55a. Injection wells also are treated as "oil and gas wells" under section 263 of the Internal Revenue Code, 26 U.S.C. § 263. *See* Rev. Rul. 69-583, 1969-2 C.B. 41.

2. Statutory and regulatory background.

a. *The TAPAA and the EPAA.* The operation of stripper properties, *i.e.*, crude oil producing properties with low average daily production per well, is only marginally economic because the expense of production is high relative to the small amount of crude oil produced.

Once such properties are abandoned, not only is there an immediate loss of domestic production but the crude oil remaining in the reservoirs becomes unrecoverable and is lost forever. *See id.* at 44a, 72a-73a. These considerations became significant when the Cost of Living Council ("CLC"), acting pursuant to its authority under the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note, imposed special price controls on crude oil and petroleum products effective August 19, 1973, 38 Fed. Reg. 22536 (1973). Congress foresaw that many of these stripper properties could become uneconomic and might be abandoned if operating costs came to exceed the maximum lawful price. *See* App. B, *infra*, pp. 71a-73a. Consequently, on November 16, 1973, Congress enacted section 406 of the Trans-Alaska Pipeline Authorization Act ("TAPAA"), 87 Stat. 590 (1973), exempting from price controls "[t]he first sale of crude oil and natural gas liquids produced from any lease whose average daily production of such substances for the preceding calendar month does not exceed ten barrels per well . . . ."

The CLC immediately implemented this statutory exemption by issuing a regulation defining "average daily production" as

> the qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar month, divided by a number equal to the number of days in that month times the number of wells which produced crude petroleum and petroleum condensates, including natural gas liquids, from that property in that month.

6 C.F.R. § 150.54(s), 38 Fed. Reg. 32494 (1973). The regulation, which was issued without notice or opportunity for comment, did not address the question whether injection wells were to be counted in determining "aver-

age daily production," and there was no "specific discussion [within the agency] with respect to injection wells in the course of the development of that regulation." App. B, *infra*, p. 99a. The regulatory draftsman "did not even know what an injection well was!" *Id.* at 98a.

On November 27, 1973, Congress enacted the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 87 Stat. 628 (1973), which replaced the ESA as the basic statutory authority for the imposition of petroleum price controls. The exemption for stripper properties was preserved in section 4(e)(2)(A) of the EPAA; that provision superseded section 406 of the TAPAA, the only change being an extension of the qualifying period from the preceding calendar month to the preceding calendar year. The CLC, again without notice or opportunity for comment, promptly issued a conforming amendment to its regulation, which otherwise was left unchanged. *See* 38 Fed. Reg. 34464 (1973).

b. *Ruling 1974-29.* During the following year, many crude oil producers sought advice from the CLC and its successor agencies, the Federal Energy Office ("FEO") and the Federal Energy Administration ("FEA"), and also from the Internal Revenue Service ("IRS") (which for a time had responsibility for auditing compliance with the price controls), concerning the proper treatment of injection wells under the statutory exemption for stripper properties. App. B, *infra*, pp. 64a-66a. Officials of all four agencies advised producers that injection wells were to be counted as wells in determining a property's average daily production. *Id.* In December, 1974, however, the FEA issued Ruling 1974-29, 39 Fed. Reg. 44414 (1974), taking the opposite position that injection wells could not be counted in determining a property's average daily production for purposes of the exemption for stripper properties. The rationale advanced by the FEA

rested solely on the language of the agency's own implementing regulation:

> the FEA regulations by their specific language provide that only wells "which produce crude petroleum" are to be counted in calculating average daily production for the purpose of determining whether the stripper well lease exemption applies. While injection techniques help to "produce" crude petroleum, they are not wells which themselves "produce" crude petroleum.

Ruling 1974-29, 39 Fed. Reg. 44414 (1974).

c. *The EPCA and the ECPA.* The statutory exemption for stripper properties was repealed effective February 1, 1976, by section 401 of the Energy Policy and Conservation Act of 1975 ("EPCA"), 89 Stat. 871 (1975). It was revived just eight months later, however, by section 121 of the Energy Conservation and Production Act ("ECPA"), 90 Stat. 1125 (1976), in language essentially the same as that earlier contained in the TAPAA and the EPAA. It does not appear that Congress had Ruling 1974-29 before it at the time it enacted the ECPA. To the contrary, Senator Bellmon, a proponent of the exemption, later complained that "[w]hen we originally enacted the stripper exemption, and when we reenacted it in 1976, I certainly believed that the FEA (now Department of Energy) would follow the very sensible precedent set by the Interior Department." 123 Cong. Rec. 36058 (1977).

Following enactment of the ECPA, the FEA issued a new implementing regulation, which in all essential respects was the same as the regulation promulgated by the CLC in November, 1973. 10 C.F.R. § 212.54, 41 Fed. Reg. 48319 (1976). The FEA and its successor, the Department of Energy ("DOE"), have taken the position that Ruling 1974-29 is a controlling interpretation of this

regulation as well as of the earlier regulations promulgated under the TAPAA and the EPAA.

3. Proceedings below.

a. *The initial order granting summary judgment.* In late 1976 and early 1977, Braden-Zenith, Inc., Sierra Petroleum Co., Inc., and Energy Reserves Group, Inc. instituted separate civil actions in the United States District Court for the District of Kansas. Each plaintiff sought to enjoin the FEA from enforcing its regulations in a manner that would prohibit crude oil producers from including injection wells in the computation of average daily production per well for purposes of the exemption for stripper properties. Their actions were consolidated by the district court.[1]

The litigation initially focused on the propriety of the procedures followed by the FEA in promulgating Ruling 1974-29. On cross-motions for summary judgment, the district court held that because Ruling 1974-29 was treated by the agency as a rule of law and not merely as an interpretation, App. C, *infra*, pp. 125a-129a, and also because it had a substantial impact on the industry, *id.* at 129a-131a, the Ruling was a legislative rule "rather than an interpretive order." *Id.* at 132a. The court concluded that "[b]ecause Ruling 1974-29 was promulgated by the FEA without notice or opportunity for comment, it is void and ineffective . . . ." *Id.*[2]

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[1] The district court had jurisdiction under section 211(a) of the ESA and 28 U.S.C. § 1331.

[2] The court further held, however, that " 'good cause' existed for the CLC's failure to follow APA notice and comment procedures [in issuing the regulations under the TAPAA and the EPAA]." *Id.* at 137a.

b. *The first appeal.* The court of appeals reversed and remanded for further proceedings, with one judge dissenting. App. D, *infra*, p. 172a. There was no opinion of the court; each judge wrote separately. Judge Becker's opinion described the issue on appeal as involving solely the question whether the FEA had been required to give notice and afford an opportunity for public comment before issuing Ruling 1974-29. *Id.* at 141a. He concluded that such procedures had not been required, reasoning that the Ruling was clearly interpretative and not legislative, *id.* at 155a-158a, that a "substantial impact" did not transform an interpretative rule into a legislative rule, *id.* at 158a-167a, that Ruling 1974-29 had no "substantial impact" anyway, because it was a reasonable interpretation of the regulations, *id.* at 167a-168a, that the Ruling in any event was not even a "rule" within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551(4), because as a mere interpretation it had no "future effect," *id.* at 169a-172a, and, finally, that failure to follow the procedural requirements of the APA would have been at worst only harmless error, *id.* at 172a. Judge Christensen concurred "in the result reached . . . and with most of Judge Becker's analysis and reasoning . . . ." *Id.* at 175a. He was "troubled by the unqualified assertion that there is nothing in the APA to warrant employment of the 'substantial impact' test to classify interpretative and legislative rules," *id.*, but he viewed Ruling 1974-29 as "essentially the sort of an interpretation that must have been intended by the APA exception to the rulemaking requirement." *Id.* at 177a. Judge Zirpoli dissented on the ground that Ruling 1974-29 was a legislative rule by virtue of its substantial impact on the industry. *Id.* at 184a-194a.

c. *Consolidation of multidistrict litigation.* After this litigation had begun, a large number of similar actions were filed around the country. App. E, *infra*, pp.

197a, 203a-204a. In June, 1979, the Judicial Panel on Multidistrict Litigation transferred these actions to the District of Kansas for consolidation with the actions brought by the original plaintiffs. *Id.* at 203a.

d. *Denial of mandamus.* After remand and consolidation, the government took the position that the decision of the court of appeals had disposed of all issues in the case and that final judgment should be entered in its favor. When the district court announced its intention to consider the validity of the agency's implementing regulations, as construed by Ruling 1974-29, the government filed a petition for a writ of mandamus in the court of appeals. App. F, *infra*, pp. 205a-206a. The same panel that had heard the first appeal considered and unanimously denied the petition. *Id.* at 205a, 216a. In doing so, the panel furnished a "clarification of what we thought was manifest in our prior decision . . . ." *Id.* at 213a.

> In sum, the present situation is that the consistency of Ruling 1974-29 with the APA has been finally established and . . . both judges concurring in the result clearly indicated the majority view that the ruling in question did not represent any substantial departure from the meaning of the regulation, and for this reason had no substantial impact as an interpretative ruling. Whether the regulation itself was within the authority of the FEA to promulgate, despite its conceded procedural regularity, or whether it was arbitrary or capricious does not so clearly appear from a consideration of the decision as a whole.

Id. at 209a-210a (footnotes omitted). Thus, the court of appeals left for consideration by the district court the "unresolved issues as to whether the ruling [*sic*] in question is arbitrary, capricious or unreasonable in light of, or

is in conflict with, or is beyond the authority granted by controlling statutory provisions . . . ." *Id.* at 212a.

e. *The decision of the district court after trial.* Trial of the consolidated actions was held in January and February, 1981. After trial, the district court concluded, upon a lengthy analysis of the factual and regulatory background and the legislative history, that "the agency's decision to exclude injection wells from the well count for the purposes of determining average daily production was beyond the authority of the agency, and was contrary to the intent of Congress." App. B., *infra*, p. 87a. This conclusion was confirmed, the district court held, by consideration of the arbitrary and capricious manner in which the agency had adopted its regulation, *id.* at 99a, and the lack of any "rational basis for differentiating between injection and recovery wells for the purpose of this exemption," *id.* at 101a. The court found that "[t]he written material before the agency contain[ed] no basis for a decision either to include or exclude injection wells," *id.* at 96a, and that "[a] reading of the record makes it manifestly clear that the agency had *no basis* at all for making its determination," *id.* (emphasis in original). The exclusion of injection wells was, the court concluded, simply irrational:

> [A]n injection well is physically similar in construction to a recovery well. The costs associated with drilling and maintaining an injection well are as great or greater than costs associated with drilling or maintaining a recovery well. . . . The water forced into the reservoir, via the injection well, provides energy pressure, displaces crude oil, and forces oil from the reservoir into the well bore of a recovery well. The fact is that but for the injection wells, such crude oil would not have been obtained. . . . The problems which the Congress envisioned are equally addressed by allowing injection wells to be included in the well count as by allowing recovery wells to be

> so counted. . . . Excluding injection wells seems as nonsensical as would be a decision to exclude fathers from a count of parents.

Id. at 101a-102a (citation and footnote omitted).

f. *The second appeal.* A new panel of the court of appeals reversed. The court agreed that "[t]here is no question that continued production . . . was the paramount sought after result from the exemption." App. A, *infra*, p. 21a. But without even alluding to the district court's findings that the costs of and regulatory restrictions on the drilling and operation of injection wells prevented any possibility of abuse, *see* App. B, *infra*, p. 84a, the court of appeals reasoned:

> Including injection wells in the count could possibly lead to a serious abuse of the purposes of the exemption. A lease operator could be encouraged to convert old abandoned wells to obtain the benefits of the exemption. . . . Ruling 1974-29 eliminates any potential for such abuse. Perhaps it could be considered an extreme measure but it is not arbitrary or capricious.

App. A, *infra*, pp. 30a-31a. In addition, the court deduced a congressional intent to exclude injection wells from the failure, in a subsequent Congress, of an effort to amend "the definition of stripper oil to include water and other injection wells in computing the average daily production per well . . . ." *Id.* at 25a.[3]

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[3] In addition, the court relied upon a statement of the plaintiffs' counsel at oral argument, which it misconstrued to mean that "[t]he amount of oil subject to the exemption under appellees' interpretation is much greater than originally anticipated and intended." *Id.* at 24a. In fact, counsel's statement pertained to all secondary recovery projects, not just to those properties that would qualify for the exemption if injection wells were included in computing average daily production. *See id.*

In the last analysis, however, the evident basis for reversal was the court of appeals' determination that the earlier appellate decisions in the case had effectively foreclosed further litigation. Although, on petition for mandamus, the earlier panel had left open the questions whether "the regulation itself was within the authority of the FEA to promulgate . . . or whether it was arbitrary or capricious," App. F, *infra*, pp. 209a-210a, the new panel once more focused on the validity not of the regulations themselves but of Ruling 1974-29. *See* App. A, *infra*, pp. 2a, 3a, 4a, 5a, 6a, 7a, 8a, 14a, 22a, 26a, 28a, 32a. The new panel stated that the earlier panel not only had "expressed a rather strong belief . . . [in the validity of] Ruling 1974-29," *id.* at 6a, but actually had "implicitly held that Ruling 1974-29 is valid," *id.* at 7a. The court further stated that while the earlier opinions had "not expressly [held] that Ruling 1974-29 is fully valid, there should have been no serious doubt that the court believed such was the case." *Id.* at 28a. The court concluded that "Ruling 1974-29 [is] valid and [therefore] reverse[d] the decision of the district court." *Id.* at 8a.[4]

REASONS FOR ALLOWING THE WRIT

This case presents an important question of statutory construction that should be settled by this Court. In its treatment of this question, the court of appeals disregarded several precedents of this Court and departed

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[4] The court explained that its treatment of the earlier opinions as dispositive was "completely supported" by the fact that Judge Becker, in *dictum* in his opinion for the court in *Wiggins Brothers, Inc.* v. *DOE*, 667 F.2d 77 (TECA 1981), *cert. denied*, 50 U.S.L.W. 3783 (U.S. March 30, 1982), had characterized his earlier opinion in the first appeal in this case as having settled all issues in this litigation once and for all. App. A, *infra*, pp. 29a-30a.

in numerous ways from the accepted and usual course of judicial proceedings. Its decision, moreover, was incorrect.

1. *The question is important.* The issue presented by this multidistrict litigation is of enormous monetary importance to the petroleum industry. In terms of the amount of money actually involved, this may well be the most significant case pending in the United States today. By the time of the district court's decision in July, 1981, "there ha[d] been accumulated in trust under court supervision a fund approximating one billion dollars, which awaits judicial distribution upon the termination of this litigation." App. B, *infra*, p. 39a. This fund, moreover, is only part of the story. It represents only the amount at issue for those plaintiffs who obtained preliminary injunctions. Additional hundreds of millions of dollars are at stake with respect to other plaintiffs as well as crude oil producers who have not participated in this litigation.[5]

This case is significant not only in monetary terms but in the breadth of its impact on the petroleum industry generally. This is not a matter that concerns only major business corporations, although their interests certainly are affected. Thousands, perhaps hundreds of thousands, of smaller businesses and individuals who own working or royalty interests in producing fields also have an immedi-

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[5] Producers not participating in this litigation nevertheless presumably will be bound by its result under the doctrine of *stare decisis*. The petitioners argued to the court of appeals that it lacked appellate jurisdiction over this case, but the court ignored that argument and proceeded to decide the merits. In view of that disposition, there is no significant prospect of further appellate adjudication elsewhere leading to a conflict among the courts of appeals, for the court below appears to have asserted exclusive jurisdiction over appeals in cases of this kind under section 211(b)(2) of the ESA.

ate and direct stake in the outcome, as do the many states that own interests in or collect severance taxes on the production of crude oil.

The significance of this case, moreover, is not limited to the prices producers were entitled to receive in the past. The outcome also will determine the application of the windfall profit tax for the present and future. Under that tax, so-called "tier 2" oil, which is subject to a reduced rate of tax on a smaller increment of profit, *see* 26 U.S.C.A. §§ 4987(b) and 4989(c) and (d), is defined as "any oil which is from a stripper well property within the meaning of the June 1979 energy regulations." 26 U.S.C.A. § 4991(d)(1)(A). Beginning in 1983, moreover, such crude oil will be completely exempt from the tax when produced by an "independent producer." *See* 26 U.S.C.A. §§ 4991(a) and (b) and 4994(g)(1) ("exempt stripper well oil"). Because it concerns the meaning to be ascribed to pivotal terms under the windfall profit tax, and in that way will continue to bear upon the incentives for domestic production of crude oil, the question presented has substantial prospective significance.

2. *The court of appeals disregarded this Court's prior decisions and substantially departed from the accepted and usual course of judicial proceedings.* The manner in which the court of appeals handled this case did not comport with proper practice and, in view of the significance of the question presented, warrants supervisory correction. The court decided the wrong issue, misapplied the earlier decisions in the case, and, in contravention of prior decisions of this Court, disregarded the district court's findings of fact and improperly relied upon subsequent congressional inaction.

a. *Wrong issue.* In its earlier opinions, the court of appeals had held only that Ruling 1974-29 had been issued in a procedurally correct fashion and that the Ruling

stated a reasonable interpretation of the agency's regulations. *See* pp. 9, 10-11, *supra*. The court had noted that this left for consideration by the district court the question whether the underlying regulations themselves, as construed by Ruling 1974-29, constituted a lawful exercise of the agency's authority to implement the statutory exemptions for stripper properties. *See* App. F, *infra*, p. 212a. This was the question considered and decided by the district court, *see* App. B, *infra*, pp. 40a, 61a, 99a-101a, 107a, and raised and discussed by all parties on appeal.[6]

The court of appeals, however, ignored this question. It treated the appeal as presenting solely "the issue of the validity of Federal Energy Administration . . . Ruling 1974-29," App. A, *infra*, p. 2a, *i.e.*, as presenting the same issue that had been decided in the earlier appellate litigation in the case. The court even justified its decision by stating that it was obligated to give the "agency's construction of its regulation great deference . . . ." *Id.* at 31a. But the issue on appeal had nothing to do with whether Ruling 1974-29 correctly construed the agency's regulations. The issue concerned the validity of the regulations themselves.

b. *Misapplication of earlier decisions.* The court of appeals' carelessness in framing the issue was not merely harmless error. It led to a misapplication of the earlier decisions in the case and resulted in a serious miscarriage of justice. The court's determination that the issue before it on appeal had been foreclosed by the earlier decisions in the case, App. A, *infra*, pp. 26a-30a, is explicable only on the theory that the court was deciding the wrong issue.

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[6] *See* Brief of Defendant-Appellant at 1; Brief of Plaintiffs-Appellees at 1.

As applied to the issue actually before it, the court's determination is both preposterous and grossly unfair.

The court's reading of its earlier decisions is refuted by the plain language of the opinion denying the government's petition for mandamus. In that opinion, the earlier panel expressly had stated that its own earlier decision "did not definitely resolve any statutory problem," App. F, *infra*, p. 212a, and the panel had left open, as "unresolved issues," *id.*, "[w]hether the regulation itself was within the authority of the FEA to promulgate . . . or whether it was arbitrary or capricious . . . ," *id.* at 209a-210a. Moreover, the new panel's reading of the earlier opinions affronts common sense. It would have been irresponsibly mischievous for the earlier panel to have required the parties and the district court to proceed through the expensive and time-consuming process of discovery and trial on an issue that the panel already had decided. If it previously had upheld the agency's regulations on the merits, the earlier panel would not have denied the government's petition for mandamus.

"[T]he effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs . . . their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard." *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U.S. 257, 267 (1910). By misreading and misapplying the earlier panel's opinion, the court below effectively deprived the plaintiffs of an opportunity to be heard on the central question of the correctness of the agency's construction of the statutory exemption. The earlier panel had left that question to be resolved later. The later panel then held that the question in fact had been resolved earlier. The plaintiffs lost the case without either panel addressing the question squarely. Such judicial sleight-of-hand is inexcusable.

c. *Disregard of the district court's findings of fact.* The court of appeals overrode the district court's findings of fact without even acknowledging that it was doing so, in blatant disregard of Fed. R. Civ. P. 52 ("[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses"). The court of appeals asserted that to permit injection wells to be counted as wells in computing average daily production would "lead to a serious abuse," App. A, *infra*, pp. 30a-31a, and "create an opportunity for mass evasion," *id.* at 31a, such that it "could occur," *id.*, "that injection wells would spring up all over the country . . . ," *id.* If the court had read the district court's opinion with care, it would have known that this speculation was not merely unfounded but flatly incorrect. The district court had found:

> The costs of drilling or maintaining injection wells are as large or larger than comparable costs on a recovery well. Because of natural forces, *a provision allowing the counting of injection wells has no greater potential for abuse than a provision excluding the counting of injection wells.* Likewise, as noted, state oil regulatory practices are designed to prevent industry abuse.

App. B, *infra*, p. 84a (emphasis added). The district court's finding on this point was supported by a wealth of evidence relating to the cost and complexity of secondary recovery projects and the state regulatory restrictions governing the drilling and use of injection wells. *See id.* at 43a-52a. It was clear error for the court of appeals not to accept this finding as controlling. *See Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 50 U.S.L.W. 4592, 4596 (U.S. June 1, 1982); *Pullman-Standard* v. *Swint*, 50 U.S.L.W. 4425, 4429 (U.S. April 27, 1982); *Zenith Radio*

Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).[7]

d. *Improper reliance upon subsequent congressional inaction.* The court of appeals relied upon the inaction of a subsequent Congress in 1978 as "clear and convincing evidence that Congress intended [to exclude injection wells] when it enacted and reenacted the stripper well exemption [in 1973 and 1976]." App. A, *infra*, p. 25a. That use of subsequent congressional inaction was plainly erroneous:

> . . . statutes are construed by the courts with reference to the circumstances existing at the time of passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance . . . .

United States v. *Wise*, 370 U.S. 405, 411 (1962).[8]

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[7] The court of appeals also erred in stating that "[f]rom 1973 to 1977, the FEA applied a single and unequivocal interpretation of the stripping [*sic*] well regulations." App. A, *infra*, p. 24a. The district court specifically found that between December, 1973, and October, 1974, "oil producers [had been] advised to count injection wells . . . . [and] that the current interpretation is not one which has been followed consistently over a long period of time . . . ." App. B, *infra*, pp. 64a, 68a.

[8] The court of appeals apparently also assumed that when Congress re-enacted the exemption for stripper well properties in 1976, it did so in light of the gloss placed upon the agency's regulation by Ruling 1974-29. App. A, *infra*, p. 24a. But there is no "evidence of any particular consideration of these regulations [or Ruling] by Congress during re-enactment." *Rowan Cos.* v. *United States*, 452 U.S. 247, 262 (1981). *See also, e.g., United States* v. *Calamaro*, 354 U.S. 351, 359 (1957).

3. *The court of appeals' decision was incorrect.* DOE and its predecessor agencies exceeded their authority in excluding injection wells from the computation of average daily production for purposes of the statutory exemption for stripper properties.

a. *The agency's determination to exclude injection wells is entitled to no deference.* The court of appeals erred in giving the agency's position "great deference." App. A, *infra*, p. 31a. In determining the weight to be accorded an agency's interpretation of a statute, this Court looks to "the thoroughness evident in its consideration, [and] the validity of its reasoning . . . ." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). *Accord, e.g., St. Martin Lutheran Church* v. *South Dakota*, 451 U.S. 772, 783 n.13 (1981). When the CLC promulgated its regulations implementing the TAPAA and the EPAA, it did not even consider the application of those statutes to injection wells. When the FEA issued Ruling 1974-29, it furnished no reason at all for reading the statutory exemption to exclude injection wells. The agency's position quite plainly was not "based on a consideration of the relevant factors . . . ." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

The regulations implementing the TAPAA and the EPAA were issued immediately after the enactments of those statutes, without any input from interested persons in the industry. *See* pp. 5-6, *supra*. "The written materials which the DOE has identified as the agency record on which the regulation was based contains no references to the counting of injection wells . . . [and] contains no basis for a decision either to include or exclude injection wells." App. B, *infra*, p. 96a.

> The agency did not consider the impact which excluding or including injection wells would have on domes-

> tic petroleum reserves, or on domestic oil production. The agency did not consider the role and function of injection wells in the recovery of crude oil. The agency did not consider the extent of capital costs in secondary recovery projects. The agency did not consider whether inclusion or exclusion created an incentive or disincentive for establishing secondary recovery projects, or whether exclusion of injection wells would lead to premature abandonment of marginal properties. The agency did not consider the treatment of injection wells by state agencies or by other agencies of the federal government. In short, the agency considered no "studies, analyses, information or facts" prior to the promulgation of the regulation.

Id. (citations omitted).

The wisdom of including or excluding injection wells similarly was ignored when the FEA issued Ruling 1974-29. Once again, the agency acted on its own without soliciting comments from interested persons in the industry, a procedure that makes it "likely that significant factors will be overlooked or too easily discounted." *Kollett* v. *Harris*, 619 F.2d 134, 140 n.5 (1st Cir. 1980). Ruling 1974-29 made no pretense of attempting to construe the statutory language in light of the stated congressional objectives. The Ruling did not discuss or even refer to the statutory language, the legislative purpose, or any considerations of policy or practicality. It rested solely upon language in the agency's regulation that was not contained in the underlying statutes. *See* pp. 6-7, *supra*. "This lack of specific attention to the statutory authorization," *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 n.5 (1978), deprives the Ruling of any persuasive force. *See SEC* v. *Sloan*, 436 U.S. 103, 117-18 (1978). Moreover, the justification that the agency has reiterated throughout this litigation without ever adducing any evidentiary support, *i.e.*, that a failure to exclude injec-

tion wells would lead to abuse, not only is contrary to the facts found by the district court but also is precisely the sort of "*post hoc* rationalization[] . . . [that] cannot serve as a predicate for agency action." *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 539 (1981). *See also, e.g., Investment Co. Institute* v. *Camp*, 401 U.S. 617 , 627-28 (1971).

The court of appeals erred fundamentally in failing to take account of the manner in which the agency's regulations and Ruling 1974-29 were promulgated. The history of the evolution of the agency's position does not demonstrate the application of administrative expertise, and thus there was no reason to give weight to the agency's adoption of that position. " 'The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia . . . .' " *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968) (quoting *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965)). It was the duty of the courts below, as the district court recognized, to make an independent determination of the scope of the statutory exemption. *Cf. United States* v. *Larionoff*, 431 U.S. 864, 873 (1977); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946). If the court of appeals had done so, it would have been forced to conclude that injection wells may not be excluded from the computation of average daily production under the statute.

b. *Exclusion of injection wells is inconsistent with the legislative intent and frustrates the congressional objectives.* In late 1973, the embargo imposed by the Organization of Petroleum Exporting Countries had dramatized the need for maximizing domestic production of crude oil. The exemption for stripper properties was enacted at this time as an incentive for continued production from economically marginal properties. Congress

was concerned that existing price controls on crude oil might otherwise cause the abandonment of stripper properties. *See* App. B, *infra*, pp. 71a-73a. *See also* pp. 4-5, *supra*.[9]

The overriding congressional objective was to maximize production from existing reservoirs. *See, e.g.*, 119 Cong. Rec. 23875 (1973) (Senator Hansen) ("we will squeeze every last drop of this vitally important source of energy from these wells"); *id.* at 23877 (Senator Fannin) ("the Bartlett amendment is really a conservation measure and provides an incentive not to leave oil in the ground"); *id.* at 23879 (Senator Randolph) (emphasizing the need to extract "every possible drop of oil"). The Conference Report explained that the exemption for stripper properties would

> insure that direct or indirect price ceilings do not have the effect of resulting in any loss of domestic crude oil production from the premature shutdown of stripper wells for economic reasons . . . [and] encourage owners and operators of stripper wells to maintain production and to keep these wells in operation for longer periods of time than would be possible if the value of their crude oil production were determined under Phase IV price ceilings.

1973 U.S. Code Cong. & Ad. News 2531-32.[10]

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[9] The court of appeals incorrectly asserted that "[p]rice controls on oil was the fundamental purpose of the legislation." App. A, *infra*, p. 31a. The exemption for stripper properties was first enacted as part of the TAPAA, which was not otherwise concerned with price controls. Moreover, the court of appeals overlooked the fact that the specific purpose of any statutory exemption is always different from, and to some extent at odds with, the general purpose of the regulatory scheme to which it applies.

[10] The Conference Report also admonished the agency to guard against the gerrymandering of lease boundaries. *Id.* at 2532-33. But there is no indication of a purpose to exclude wells operating within pre-existing lease boundaries.

In short, "[t]he stripper well exemption was designed to encourage the operation of marginally productive wells to produce oil that otherwise would not be produced." App. B, *infra*, p. 73a. The agency's construction of the exemption runs counter to that purpose. The crucial problem addressed by the statutory exemption was the high cost of operating stripper properties. That problem remains the same, whether a property is in primary recovery, utilizing only recovery wells, or in secondary recovery, utilizing both injection wells and recovery wells. "The costs associated with drilling or maintaining an injection well are as great or greater than costs associated with drilling or maintaining a recovery well." App. B, *infra*, p. 101a. Thus, a stripper property is no less expensive to operate, and no less economically marginal, merely because it has proceeded to secondary recovery. It follows that exclusion of injection wells is both irrational and inequitable:

> . . . consider the case of a lease containing two recovery wells, each producing 10 barrels of oil per day through each physical well bore. Under the DOE interpretation this lease would qualify. Next, consider the case of another lease containing two wells, one an injection well and the other a recovery well. If the production of the second lease is 20 barrels of oil per day through the one physical well bore, the property would not qualify under the DOE interpretation, even though the costs faced by the two leases are identical and each are subject to the same disincentive effects envisoned by Congress. The second lease would seem to be as economically marginal as the first lease. The Court can envision no principled reason these two leases should be treated in different manners, and the defendant has offered no reason.

Id. at 102a n.13.

To exclude injection wells from the operation of the statutory exemption, as the agency has done, largely

denies the exemption to properties that have undertaken secondary recovery operations and defeats the legislative purpose as applied to such properties. The agency's construction denies the exemption to many properties that had proceeded to secondary recovery prior to the institution of price controls, because wells that had been converted to injection could not be counted; and it discourages operators of properties still in primary production from proceeding to secondary recovery, even though a delay in implementing secondary recovery would cause a permanent loss of reserves. *See id.* at 44a. Congress did not intend these consequences. To the contrary, Congress had recognized that "by far the biggest percentage of production from stripper wells, 10 barrels or less, is secondary or tertiary recovery," 119 Cong. Rec. 23874 (1973) (Senator Cook), and it believed the exemption would encourage "a secondary recovery program, which is a tremendous operation and is a very high cost operation . . . ." *Id.* (Senator Bartlett).[11] As of 1973, approximately one-half of all stripper properties were engaged in secondary recovery operations, and "[i]t is totally inconceivable that Congress intended to exclude nearly half of the properties subject to the exemption." App. B, *infra*, p. 78a.

The counting of injection wells in calculating average daily production for purposes of the exemption, as counsel for the government conceded at oral argument in the

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[11] As the sponsor of the exemption, Senator Bartlett was particularly well qualified to explain its intended scope, and his views are entitled to special weight. *See FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

court of appeals,[12] would stimulate additional production of crude oil by encouraging the initiation and facilitating the continued operation of secondary recovery programs.

> The use of water injection wells is a conservation measure designed to get maximum production from the oil producing wells in a given participating area. . . . [Under the regulatory program administered by the Department of Interior,] water injection wells are permitted to be counted as oil producing wells, in determining the average daily production per well, in order to encourage lessees to drill as many injection wells as will efficiently contribute to increased production.

Marathon Oil Co. v. *Kleppe*, 556 F.2d 982, 986 (10th Cir. 1977). DOE's construction of the statutory stripper exemption as excluding injection wells from the computation of average daily production therefore "frustrate[s] the policy that Congress sought to implement," *Federal Election Comm'n* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981), and fails to "harmonize[] with the statute's 'origin and purpose.' " *United States* v. *Vogel Fertilizer Co.*, 50 U.S.L.W. 4137, 4140 (U.S. Jan. 13, 1982) (quoting *National Muffler Dealer's Ass'n* v. *United States*, 440 U.S. 472, 477 (1979)).

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[12] The Court:

> Aren't they [marginal wells] better kept in production if you do allow what they seek [counting injection wells]?

Government counsel:

> Sure. If you didn't have price controls they would make more money and you would have more production.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 10-39

IN RE THE DEPARTMENT OF ENERGY STRIPPER WELL EXEMPTION LITIGATION

ENERGY RESERVES GROUP, INC., Suburban Propane Gas Corporation, Marathon Oil Company and Sklar & Phillips Oil Company; SIERRA PETROLEUM CO., INC.; BRADEN-ZENITH, INC. and The Estate of S. H. Killingsworth; MOBIL OIL CORPORATION, Mobil Producing Texas & New Mexico, Ind. and Willie Ansley Bryson; STELBAR OIL CORPORATION, INC., The Standard Oil Company, Ohio and Theo M. Glenn, Jr. and Eleanor Glenn; ROBERT DALE BRANDENBURG and Texaco, Inc.; AMINOIL USA, INC., OTIS C. PEAVEY, et al. and Sun Oil Company (Delaware); HOWARD STOUT, Lorena Houlton and Mary E. Hall, Co-Trustees of the Charles S. Page Trust and Gulf Oil Corporation; ROBERT E. DAVIS and Energy Consumers & Producers Association, Inc., Ruthven, Inc., Pioneer Operations Company, Inc.; GEORGE R. JONES, et al.; PETROLEUM MANAGEMENT INC.; ATLANTIC RICHFIELD COMPANY, W. R. MURFIN, d/b/a Murfin Drilling Company, and Champlin Petroleum Company; UNION OIL COMPANY OF CALIFORNIA; COASTAL STATES GAS CORP., Coastal States Gas Producing Co., and Gas Producing Enterprises, Inc.; EXXON CORPORATION; CONTINENTAL OIL CO.; HUNT OIL COMPANY; CRYSTAL OIL COMPANY and Ira Thomas May; MUSKEGON DEVELOPMENT CO.; OKLAHOMA ASS'N OF ENERGY CONSUMERS & PRODUCERS; PAUL B. FLETCHER, SR. and Anadarko Production Company; IU INTERNATIONAL OIL & GAS, INC.; WOOD OIL CO. and Dan Wallace d/b/a Columbus Oil Co.; WILL I. LEWIS ENTERPRISES, INC.; JIMMIE AUSTIN d/b/a Austin Drilling Company; SANTA FE ENERGY COMPANY; GEORGE G. ANDERMAN and Donald R. Kirby; PATRICIA ANNE LEONARD, *ET AL.*; FARMERS PETROLEUM COOPERA-

TIVE, INC.; KIRKWOOD OIL & GAS COMPANY; PETROLEUM CORPORATION OF TEXAS, GEORGE W. WAITE and Amoco Production Company, PLAINTIFFS-APPELLEES,

v.

DEPARTMENT OF ENERGY, *ET AL.*,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court for the District of Kansas

MDL No. 378

(Argued: April 9, 1982 Decided: July 29, 1982)

Before GRANT, LARSON and LACEY, Judges.

GRANT, Judge:

These multidistrict litigation cases, consolidated for disposition by the Judicial Panel on Multidistrict Litigation at the United States District Court for the District of Kansas, present the issue of the validity of Federal Energy Administration (now the Department of Energy (DOE)) Ruling 1974-29 which interprets the stripper well exemption as excluding injection wells from well count, for purposes of applying the exemption from allocation and price regulation which is accorded crude petroleum produced from stripper well leases.[1]

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[1] The ruling in question, Ruling 1974-29 (39 Fed. Reg. 44414, December 24, 1974), provides in its relevant part as follows:

> *Issue.* Is an "injection" well a "well" for the purpose of determining whether the average daily production of a property was 10 barrels or less per well in the preceding calendar year, for purposes of the stripper well lease exemption of 10 CFR 210.32?
>
> *Ruling.* No. Under the FEA regulations, the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease, is exempt from the mandatory price and allocation regulations. A stripper well lease is defined as a property whose average daily

Background

The origin of these cases is with the decision of the United States District Court for the District of Kansas in *Energy Reserves Group, Inc.* v. *Federal Energy Administration*, 447 F. Supp. 1135 (D. Kan. 1978). In that case, Judge Theis invalidated Ruling 1974-29 on the basis that it was promulgated without satisfying the rulemaking requirements of the Administrative Procedure Act (APA). Importantly, Judge Theis did not, in his ruling, reach other challenges to the validity of Ruling 1974-29 but instead rested his decision solely upon nonconformity with the APA. On appeal, this court reversed that decision, in a plurality opinion, holding that the Ruling was "Clearly Interpretative and Exempted From the Requirements" of the APA. *Energy Reserves Group, Inc.* v. *Department of Energy*, 589 F.2d 1082, 1091 (Temp. Emer. Ct.

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production did not exceed 10 barrels per day per well during the preceding calendar year. "Average daily production" is further defined in 10 CFR 210.32(b) as:

> The qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of days in that year times the number of wells which produce crude petroleum and petroleum condensates, including natural gas liquids, from that property in that year.

Thus, the FEA regulations by their specific language provide that only wells "which produce crude petroleum" are to be counted in calculating average daily production for the purpose of determining whether the stripper well lease exemption applies. While injection techniques help to "produce" crude petroleum, they are not wells which themselves "produce" crude petroleum. Therefore, wells which did not actually yield or produce crude petroleum during the preceding calendar year are not production wells for this purpose. Whether the nonproducing well was an "injection" well, a disposal well, a dry well, a spent well or a shut-in well will not change this result.

App. 1978) (*Energy Reserves I*).[2] In that appeal, the appellees argued that Ruling 1974-29 was legislative in nature and effect and thus subject to the notice and comment requirements of the APA. 5 U.S.C. § 553(b) and (c). That argument was rejected, with Judge Becker writing:

> Assuming for purposes of discussion only that the "substantial impact" test determines whether an administrative rule is "interpretative" or "legislative," Ruling 1974-29 had no substantial impact on appellees.
>
> If Ruling 1974-29 was a reasonable interpretation of the stripper well statutory exception of EPAA and TAPAA, or of 10 C.F.R. § 210.32, or both, it had no impact. In that event the impact came from the statute and valid legislative regulation being interpreted, not from the interpretative ruling.
>
> It is submitted that Ruling 1974-29 is a reasonable interpretation of the term "average daily production" as used in § 406 of TAPAA, § 4(e)(2)(A) of EPAA, and in 10 C.F.R. § 210.32(b). As such it had no "impact" if such be a test. The "impact," if any, resulted earlier from the statute and from the regulation 10 C.F.R. 210.32(b) found to be valid by the district court. The interpretation of § 406 of TAPAA and § 4(e)(2)(A) of EPAA to exclude injection wells in computing "average daily production" was a reasonable contemporaneous construction of the statute and created no new law or legislative rule.

589 F.2d at 1098.

Additionally, Judge Christensen, in his concurring opinion, wrote:

> Notwithstanding some cross currents engendered by a considerable stirring of waters in the arguments, no sig-

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[2] In that case, the court included a comprehensive review of the history of the stripper well exemption but, because of the widespread interest in these cases, we find it useful and necessary to repeat much of that history here. *See also Southern Union Production Company v. Federal Energy Administration*, 569 F.2d 1147 (Temp. Emer. Ct. App. 1978).

> nificant impacts appear to operate against the ruling in question. And a holding that "a well which produces crude petroleum" means, as contemplated by the properly adopted and subsisting regulations and in view of the seminal statute, *a well that produces or yields such petroleum directly rather than one which may be utilized as a part of a system to obtain indirectly crude petroleum from a producing well, seems essentially the sort of an interpretation that must have been intended by the APA exception to the rulemaking requirement.*

589 F.2d at 1103 (emphasis supplied).

Following remand of these cases to the district court, the DOE filed with this court a petition for writ of mandamus directing the district judge to execute the mandate of our previous decision. It argued that *Energy Reserves I* definitively and conclusively established the validity of Ruling 1974-29, and the district court was without any authority to reach a different result. This court, with Judge Christensen now writing for a unanimous panel, denied the DOE's petition for the writ. *Duncan* v. *Theis*, 613 F.2d 305 (Temp. Emer. Ct. App. 1979). Recognizing that the previous mandate could pose some interpretation difficulties as to what exactly was decided and what was not, *Id.* at 308, the court went on to declare:

> It may well be beyond the issues thus clearly resolved by this court's decision on appeal that in line with Judge Becker's persuasive analysis and reasoning and as he has suggested, 589 F.2d at 1092, the administrative regulation and its interpretation constituted not only a reasonable construction of the statute as well, but in addition "may be the construction ultimately preferred by the courts." But since our decision did not definitely resolve any statutory problem, there is presently no basis to cut off further proceedings in the district court except for the mandated judgment sought by the petitioners.
>
> *We deny the government's petition for a writ of mandamus because of the narrow reach of this extraordinary remedy, unresolved issues as to whether the ruling in question is arbitrary, capricious or unreasonable in the light of, or is in conflict with, or is beyond the authority granted by controlling statutory provisions,* the province

> and duty of the district court, consistent with the mandate of this court and the doctrine of *stare decisis*, to exercise its reasonable discretion in determining interlocutory proceedings, record making and judgments in the first instance, the consolidation and addition of parties plaintiff following the determination of the prior appeal and the issuance of the mandate of this court, and our confidence that Judge Theis upon this clarification of what we thought was manifest in our prior decision will not transgress the fair meaning and effect of our mandate or proper application of the doctrine of *stare decisis*.

Id. at 309 (emphasis supplied) (footnotes omitted).

Thus, while denying the petition for a writ of mandamus, the court expressed a rather strong belief that it had previously implicitly held Ruling 1974-29 to be valid in all respects. This is most clearly evidenced by footnote 4 which quotes approvingly from Judges Becker and Christensen's opinions in *Energy Reserves I:*

> Judge Becker expressly held that "Ruling 1974-29 is a reasonable interpretation of the term 'average daily production' as used in § 406 of TAPAA, § 4(e) (2) (A) of EPAA, and in 10 C.F.R. § 210.32(b), found to be valid by the district court." 589 F.2d at 1098. Judge Christensen clearly stated his agreement that no significant impact operated against the ruling in question because "a holding that 'a well which produces crude petroleum' means, as contemplated by the properly adopted and subsisting regulations and in view of the seminal statute, a well that produces or yields such petroleum directly rather than one which may be utilized as a part of a system to obtain indirectly crude petroleum from a producing well, seems essentially the sort of an interpretation that must have been intended by the APA exception to the rulemaking requirement." 589 F.2d at 1103.

Id. at 308 n.4.

To assist and guide the district court with respect to the merits of any outstanding issues, the court footnoted its decision with *Yablonski* v. *United Mine Workers of America*, 454 F.2d 1036 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), wherein the Court of Appeals for the District of Columbia

addressed a situation not unlike the situation presented here. In *Yablonski*, the issue was whether the district court had failed to give "full effect" to a previous mandate from the Court of Appeals. The court stated:

> We had thought that the factual basis for our earlier decision was evident from the circumstances we cited as relevant, and its legal basis equally so from the principles we identified as controlling. By the same token, we believed that we had furnished the District Court with unequivocal standards which successor counsel . . . would have to meet.

Id. at 1039, *quoted at* 613 F.2d at 309-10 n.10. After "recapitulating" their initial holding, the *Yablonski* court proceeded to grant the petition, adding:

> [B]ut in the belief that issuance of a formal writ is unnecessary. We trade instead upon our confidence that without more the District Court will now take action to rectify the error which gave birth to the present proceeding.

454 F.2d at 1042, *quoted at* 613 F.2d at 309-10 n.10 (footnote omitted). In essence, *Duncan* v. *Theis* implicitly held that Ruling 1974-29 is valid but, rather than resorting to the extraordinary remedy of mandamus, left final determination of that question with the sound judgment of the district court.

Following the decision in *Duncan* v. *Theis*, the district court issued a lengthy opinion finding that 6 C.F.R. § 150.54(s) and subsequent similar regulations, as interpreted by Ruling 1974-29, are void and of no legal effect. *In Re Department of Energy Stripper Well Exemption*, 520 F. Supp. 1232 (D. Kan. 1981). This single paragraph summarizes the district court's reasoning:

> This Court therefore holds that the agency's decision to exclude injection wells from the well count for the purposes of determining average daily production was beyond the authority of the agency, and was contrary to the intent of Congress. The intent of Congress, as seen in the purpose and history of the measure, as well as the intent inferred through the application of appropriate

> canons of construction all indicate that injection wells should be counted. These considerations outweigh any deference due the agency's intrepretation. Furthermore, as is explained and held in the following part of this opinion, the agency's action was arbitrary and capricious so as to completely obliterate any legal doctrine of deference.

Id. at 1265-66. On this appeal, we review the district court's finding of invalidity. More specifically, we examine whether the district court has correctly construed congressional intent; whether Ruling 1974-29 exceeds the authority of the DOE; and whether Ruling 1974-29 is arbitrary and capricious. We hold Ruling 1974-29 to be valid and reverse the decision of the district court.

Statutory and Regulatory History

Rapidly rising increases in world oil prices in 1973, accentuated by the Arab oil embargo, presented the United States with a serious inflationary problem. To halt the inflationary spiral in domestic oil prices, the Cost of Living Council (CLC), acting pursuant to the Economic Stabilization Act of 1970, Pub. L. No. 91-39, 84 Stat. 796, 799, on August 22, 1973, issued its Phase IV system of price controls, setting up a two-tier price system on the first sale of all domestic production of crude oil.[3] Shortly thereafter, in two statutes enacted only eleven days apart, Congress expressly exempted from price controls oil produced from stripper well leases.

The stripper well exemption first appeared in the Trans-Alaska Pipeline Authorization Act (TAPAA) which was signed into law as Pub. L. No. 93-153 on November 16, 1973. 87 Stat.

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[3] *See* 6 C.F.R. § 150, Subpart L (38 Fed. Reg. 22536 (1973)). Under this two-tier system, a ceiling price was placed on the volume of crude oil produced from a particular property equal to or less than the level of production from that property in the same month of 1972 (old oil). Crude oil produced in excess of 1972 levels and newly discovered oil (new oil) were free of controls.

576, 584; 42 U.S.C. § 1651 *et seq.* Section 406 thereof reads as follows:

> (a) The first sale of crude oil and natural gas liquids produced from any lease whose average daily production of such substances for the preceding calendar month does not exceed ten barrels per well shall not be subject to price restraints established pursuant to the Economic Stabilization Act of 1970, as amended, or to any allocation program for fuels or petroleum established pursuant to that Act or to any Federal law for the allocation of fuels or petroleum.
>
> (b) To qualify for the exemption under this section, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.
>
> (c) The agency designated by the President or by law to implement any such fuels or petroleum allocation program is authorized to conduct inspections to insure compliance with this section and shall promulgate and cause to be published regulations implementing the provision of this section.

The Joint Statement of the TAPAA Committee of Conference explained the presence of the provision in the Alaskan Pipeline bill:

> 6. The Senate Bill had a number of miscellaneous provisions that were not directly related to oil pipeline rights-of-way. The House amendment had no comparable provisions. The Conferees' action was as follows:
>
> * * * *
>
> (c) The provision exempting the first sale of oil and gas from stripper wells from the price restraints of the Economic Stabilization Act of 1970, and from any allocation program, was adopted. A stripper well is defined as a well with an average daily production during the preceding month of not more than ten barrels. In order to qualify for the exemption the lease must be operating at a maximum

feasible rate of production and in accord with recognized conservation practices.

TAPAA Conf. Rep. No. 93-924, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Admin. News 2523, 2524 [hereinafter "TAPAA Conf. Rep."].

Eleven days later, on November 27, 1973, the President signed into law the Emergency Petroleum Allocation Act (EPAA), Pub. L. No. 93-159, 87 Stat. 627, 15 U.S.C. § 751 *et seq.* That Act contained an almost identical exemption, but changed the qualifying period from the "preceding calendar month" to the "preceding calendar year." Section 4(e) (2) thereof provided:

> (A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar *year* does not exceed ten barrels per well.
>
> (B) To qualify for the exemption under this paragraph, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.
>
> (C) Any agency designated by the President under section 5(b) for such purpose is authorized to conduct inspections to insure compliance with this paragraph and shall promulgate and cause to be published regulations implementing the provisions of this paragraph.

The only apparent mention of stripper wells in the legislative history of the EPAA appears in the Joint Explanatory Statement of the Committee of Conference.

> (8) *Stripper wells.* The conference substitute contains a provision relating to stripper wells. This provision, found in section 4(e)(2) states that the regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well. In order to qualify for the exemption, a lease must be operating at the maximum feasible rate of production and in accordance with recognized conservation prac-

> tices. Any agency designated by the President under section 5(b) of the conference substitute for such purpose is authorized to conduct inspections to insure compliance with this paragraph and shall promulgate and cause to be published requirements implementing the provisions of this paragraph.

EPAA Conf. Rep. No. 93-628, 93d Cong., 1st Sess., *reprinted in* U.S. Code Cong. & Admin. News 2688, 2699. However, in the legislative history of the TAPAA, Congress directed that in implementing the stripper well exemption, the administering agency was to "insure that the limited exemption of this class of wells for the express purposes described . . . is not in any way broadened." TAPAA Conf. Rep. at 2532. To achieve this end, the conferees emphasized that they expected the administering agency to prevent manipulation "of lease units in a manner that evades the price control and allocation programs." *Id.* The conferees ordered the agency to make certain that:

> *[T]he exemption is narrowly defined and prudently administered, and to insure that the incentive being granted is properly limited in accord with congressional intent.*

Id. at 2531 (emphasis supplied).

In order to implement the TAPAA stripper well exemption, the CLC, on November 21, 1973, issued a regulation which closely tracked the statutory language. 38 Fed. Reg. 32494 (1973); 6 C.F.R. § 150.54(s). "Stripper well lease" was defined therein as:

> a "property" whose average daily production of crude petroleum and petroleum condensates, including natural gas liquids, per well did not exceed 10 barrels per day during the preceding calendar month.

6 C.F.R. § 150.54(s) (2). "Average daily production" was defined as:

> the qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preced-

> ing calendar month, divided by a number equal to the number of days in that month times the number of *wells which produced crude petroleum* and petroleum condensates, including natural gas liquids, from that property in that month. To qualify as maximum total production, each well on the property must have been maintained at the maximum feasible rate of production, in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanial [sic] failure or other disruption in production.

Id. (emphasis supplied). After the EPAA was enacted, the definitions of "average daily production" and "stripper well lease" in the above regulation were amended on December 12, 1973, to reflect the "calendar year" period of § 4(e)(2)(A) of the EPAA rather than the TAPAA's period of a "calendar month." *See* 38 Fed. Reg. 34464 (1973). The phrase "wells which produced crude petroleum" was unaffected.[4]

Section 4(e) (2) (c) of the EPAA authorized the President to designate any agency to promulgate and publish regulations implementing the EPAA. Pursuant to this grant of authority, Executive Order 11748 (38 Fed. Reg. 33575, December 6, 1973) was issued on December 4, 1973, which delegated the President's authority under the EPAA and the Economic Stabilization Act of 1970 to the Administrator of the Federal Energy Office. On December 11, 1973, the FEO issued a notice of proposed rulemaking which, *inter alia*, incorporated the provisions set forth in Part 150 of Title 6 of the Code of Federal Regulations, 38 Fed. Reg. 34434 (1973) (10 C.F.R. § 201.4), and excluded stripper well leases from the regulations. 38 Fed. Reg. 34416 (1973) (10 C.F.R. § 200.2(a)). Final regulations were issued on December 27, 1973. 39 Fed. Reg. 744 (1974). In early 1974, 10 C.F.R. § 210.32 was issued. Section (b) thereof

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[4] On January 16, 1975, 6 C.F.R. § 150.54(s), along with other provisions of Chapters I, V, and VI in Title 6, were adopted by the Department of Treasury. 40 Fed. Reg. 3572 (1975). Section 150.54 was effectively removed.

defined "Average daily production" in the same manner as in 6 C.F.R. § 150.54(s). *See* 39 Fed. Reg. 35510 (1974). It was subsequently amended on May 15, 1975, to read:

> "Average daily production" means the qualified maximum total production of crude oil, including condensates, produced from a property, divided by a number equal to the number of days in the year times the number of wells that produced crude oil, including condensates, from that property in that year. To qualify as maximum total producton, each well on the property must have been maintained at the maximum feasible rate of production, in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production.

40 Fed. Reg. 22124 (1975) (subsequent amendments to 10 C.F.R. § 210.32 at 40 Fed. Reg. 24517, 31927, 40820 and 52843 are irrelevant for purposes of this appeal).

The problem resulting from the issuance of these regulations is that nowhere, except possibly by implication, was the term "well" defined to exclude injection wells. The FEA interpreted the regulations to exclude injection wells from the well count in calculating "average daily production" per well. The industry strongly disagreed with this interpretation and argued that injection wells should be included in the well count because they were a necessary part of a secondary recovery system.[5] In response, the FEA, on December 19, 1974, issued Ruling 1974-29 which expressly excludes injection wells from the

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[5] Through an injection well, fluids are forced into an underground oil reservoir to maintain reservoir pressure to help increase production of nearby producing wells. *See Wiggins Brothers, Inc.* v. *Department of Energy*, 667 F.2d 77, 80 (Temp. Emer. Ct. App. 1981), *cert. denied*, ___ U.S. ___, 50 U.S.L.W. 3783 (1982); *Energy Reserves I*, 589 F.2d at 1105 (Zirpoli, J., dissenting). Inclusion of injection wells in the calculation of average daily production would enable a producer to divide his total production from a property by a greater number of wells, thereby allowing more production to qualify for the exemption by falling under 10 barrels per day per well.

calculation of average daily production in determining the applicability of the stripper well exemption from the price control program. The following paragraph from the Ruling (quoted in its entirety in n.1, *supra*) concisely articulates the FEA's reasoning:

> Thus, the FEA regulations by their specific language provide that only wells "which produce crude petroleum" are to be counted in calculating average daily production for the purpose of determining whether the stripper well lease exemption applies. While injection techniques help to "produce" crude petroleum, they are not wells which themselves "produce" crude petroleum. Therefore, wells which did not actually yield or produce crude petroleum during the preceding calendar year are not production wells for this purpose. Whether the non-producing well was an "injection" well, a disposal well, a dry well, a spent well or a shut-in well will not change this result.

This Ruling, here under challenge, has been consistently adhered to since first issued.

Post-Enactment Developments

The stripper well lease exemption underwent a significant change not very long after its enactment. Section 401 of the Energy Policy and Conservation Act of 1975 (EPCA), Pub. L. No. 94-163, 89 Stat. 871, 42 U.S.C. § 6201 *et seq.* and 15 U.S.C. § 751 *et seq.*, repealed the stripper well lease exemption of the EPAA and required the President to "establish ceiling prices" for stripper well production. FEA regulations were amended accordingly with 10 C.F.R. § 210.32 deleted on February 1, 1976. 41 Fed. Reg. 4939 (1976).

Just eight months later, however, on August 14, 1976, Congress enacted the Energy Conservation and Production Act (ECPA), Pub. L. No. 94-385, 90 Stat. 1125, 15 U.S.C. § 751 *et seq.* Section 121 thereof amended § 8 of the EPPA of 1973 by adding the following pro 'sion:

> (i) (1) *The first sale price of stripper well crude oil shall be exempt from the regulation promulgated under section*

4 of this Act as amended pursuant to the requirements of this section.

* * * *

(2) For the purposes of this subsection, "stripper well crude oil" means crude oil produced and sold from a property whose maximum average daily production of crude oil per well during any consecutive 12-month period beginning after December 31, 1972, does not exceed 10 barrels.

(3) To qualify for the exemption under this subsection, a property must be producing crude oil at the maximum feasible rate throughout the 12-month qualifying period and in accordance with recognized conservation practices.

(4) The President may define terms used in this subsection consistent with the purposes thereof.

90 Stat. at 1133, 15 U.S.C. § 757(i) (emphasis supplied). On October 29, 1976, 10 C.F.R. § 212.54 was issued which provided in pertinent part:

"Average daily production" means the qualified maximum total production of crude oil (excluding condensate recovered in non-associated production) produced from a property, divided by a number equal to the number of days in the 12-month qualifying period times the number of *wells that produced crude oil* (excluding condensate recovered in non-associated production) from that property in that 12-month qualifying period. To qualify as maximum total production, each well on the property must have been maintained at the maximum feasible rate of production throughout the 12-month qualifying period and in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production.

* * * *

"Stripper well property" means a "property" whose average daily production of crude oil (excluding condensate recovered in non-associated production) per well did not exceed 10 barrels per day during any preceding

> consecutive 12-month period beginning after December 31, 1972.

41 Fed. Reg. 48323 (1976) (emphasis supplied).

As the language of these provisions demonstrates, Congress and the FEA refused to expand the stripper well exemption beyond its scope prior to being repealed. Congress did, however, address the growing importance of secondary recovery techniques. In doing so, it modified 15 U.S.C. § 757(d) (3) (C) which allowed for a special adjustment for production from marginal wells, including production from stripper wells, and lumped together all secondary recovery techniques, a category within which injection wells were intended to fall, for exemption purposes. *See* 15 U.S.C. § 757(j). The Conference Report to the ECPA explained this action as follows:

> The conferees are agreed that there exists great potential for augmenting domestic crude oil production through the application of enhanced recovery techniques. There is also a general agreement that current economic circumstances would permit adjustments to the pricing mechanism contained in the Energy Policy and Conservation Act to give needed additional incentives for the application of high-cost enhancement techniques which today are not economical. The conferees could not, however, agree to the provisions of the Senate amendment which would permit substantial price increases for commonplace secondary enhancement techniques such as water flooding and gas displacement. Moreover, the conferees did not believe it wise to attempt to create in rigid statutory language a special classification of domestic production which would be freed of price restraints. Unlike the case of stripper well production, for which there is both a long legislative and administrative history, there is not common agreement as to the practicality, feasibility or cost-effectiveness of the various enhancement techniques employed throughout the industry.

S. Conf. Rep. No. 94-1119, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Admin. News 2027, 2047. Thus, as was recognized by Senator Jackson in later debate, *see* 123 Cong. Rec. 36059 (1977), Congress did provide in the EPAA a procedure by which a producer could obtain an exemption for

the costs of secondary recovery techniques, including injection wells.

Senator Bartlett of Oklahoma, one of the principal architects and proponents of the stripper well exemption, who had on many occasions urged its expansion, stated in Senate debate on March 31, 1976:

> In the Emergency Petroleum Allocation Act of 1973—EPAA—Congress voted overwhelmingly to allow stripper production to receive free market prices. The new pricing provisions of the EPCA place stripper and other categories of production under price controls. In this bill the definition of stripper production is expanded to include marginal production other than from wells producing less than 10 barrels per day. This additional marginal well category includes production from high watercut wells, from some deeper and offshore wells producing in excess of 10 BPD, and from marginal fluid injection projects.

122 Cong. Rec. 8757 (1976). In the Senate version of that "bill" he mentions, S. 3233, injection wells were included, with a proposed amendment to § 8 of the EPAA to include the following provision as (i) (3):

> To qualify for the exemption under this subsection a property must be producing crude oil at the maximum feasible rate and in accordance with recognized conservation practices, and if injection wells are to be counted to determine the number of wells for a property, the injection wells must be injecting into the crude oil producing reservoir and the injection operations must have been initated according to sound engineering principles for the purpose of increasing ultimate recovery or the producing rate of crude oil from the property.

Id. at 8758. The Senate and House conferees failed to accept that Senate amendment. It is obvious from the final measure enacted by Congress, that Senator Bartlett did not succeed in obtaining the "expanded" interpretation he sought. Congress decided to maintain the scope and nature of the stripper well exemption just where they were prior to being eliminated by the EPCA.

Following a public hearing on September 22, 1976, the FEA, on October 29, 1976, adopted a stripper well exemption again substantially similar to the previous regulations. That regulation is quoted earlier in this opinion at page 15. 41 Fed. Reg. 48323 (1976). The stripper well exemption was placed in essentially the same position it was in prior to being repealed. Senator Bartlett's efforts to obtain an expanded exemption were unsuccessful. Nonetheless, he vigorously continued to seek to amend the established law to include injection wells in the well count. The most important act by Senator Bartlett for purposes of this appeal occurred in the fall of 1977.

On October 31, 1977, during Senate debate on a bill to extend the life of the EPAA of 1973, Senator Bartlett offered an amendment (No. 1502) to the EPAA of 1973 "to clarify the intent of the 'stripper well' amendment." 123 Cong. Rec. 36058 (1977). His amendment provided that injection wells would be counted, together with producing wells, to determine the stripper well status of a lease. His amendment read as follows:

> Sec. ____. Section 8(i) (2) of the Emergency Petroleum Allocation Act of 1973, as amended, is amended by adding the following new sentence at the end thereof: "Including in the count of the total number of wells on a property shall be all wells producing crude oil and all wells utilized for the purpose of injecting water and or other materials into a producing reservoir for the purpose of enhancing crude oil recovery."

Id. A lively debate ensued with the vast majority of speakers in favor of the amendment. Senator Bartlett stated:

> First, let me approach the cost question this way.
>
> In looking at the producing well alone, the costs involved of the small producer are those costs of just producing that well, operating the pumping unit, presumably, keeping in good shape the lead line to the tank, keeping the property cleaned up, and the normal expenses, pulling the well occasionally, and so on.
>
> The cost of operating an injection well in a waterflood is roughly the same as that for a producing well.

So for a stripper waterflood to be treated fairly under the stripper well amendment, we should, therefore, count the injection wells as oil wells for the purpose of qualifying.

Id. Senator Tower stated:

The inclusion of injection wells in the computation of a property's barrels-per-day average per well, for purposes of the stripper oil exemption, would be a natural and beneficial change. It would be a change which would make the law more reasonable and less arbitrary. Most important, it would add significantly to the Nation's supply of domestic crude oil by extending the economic life of many older, developed oil fields.

Id. at 36061. Senator Bellmon stated:

Mr. President, very briefly, I would simply like to say I consider it to be senseless not to permit the counting of injection wells when determining average daily production. If these are not oil wells in the strict sense of the word, they are certainly essential to oil production. I felt, when we passed the stripped well amendment initially, they would be included. The Interior Department has long counted injection wells.

Id. Senator Dole stated:

This amendment would let producers count both the producing wells and the injection wells when he is calculating the number of barrels per well that he produces from the property.

I think this would certainly be fair. While these injection wells are very costly, they produce no oil of their own and thus they produce no profits for the producer. Yet, without them there would be no production from such a property at all. They deserve to be counted as part of the total number of wells on the property.

Id. at 36062. And Senator Bumpers stated:

I had some reservations about the amendment, because I felt there was some serious potential for abuse here in drilling these salt injection wells in order to get the upper tier price of the stripper price, the decontrolled price. But I talked with the people in my State who are in this

> business. Virtually all the oil produced in my State is stripper oil, and they tell me that as a practical matter, this is not likely to be abused, because these wells are expensive to drill and to maintain, and that any figure we establish here of the number of wells that can be used in terms of the formula will be highly arbitrary.

Id. at 36063. The only speaker opposed to the amendment was Senator Jackson, who argued:

> Mr. President, I oppose this amendment and urge that it be defeated.
>
> The proponents are arguing here, in effect, that it clarifies the intent of the so-called stripper well amendment. Mr. President, I supported the original exemption from price controls for the so-called stripper wells.
>
> I point out that the language of the existing law expressly refers to wells producing crude oil. It does not include injection wells, nor was it intended to. The effect of the amendment would be to expand the number of crude-oil producing properties which are exempt from price controls.
>
> The Department of Energy indicates that it is unable to determine the amount of production that would be decontrolled. It is even more difficult to determine whether and to what extent the amendment would yield any additional production over and above that which is already stimulated by the current exemption for stripper wells.
>
> Much of the oil to which the amendment would apply is old oil which was discovered several years ago. The amendment—so that we all understand—would allow the price to jump from $5.25 to almost $14 over night. I see no justification for this $9 per barrel windfall.
>
> Mr. President, in connection with the colloquy between the distinguished Senator from Colorado (Mr. Hart) and the distinguished Senator from Oklahoma (Mr. Bartlett), I point out that the existing law, the Emergency Petroleum Allocation Act, does provide a procedure by which the producer can, in fact, get an exemption for secondary recovery, including injection wells. In response to the question posed by the Senator from Colorado, the hitch is

> that these producers must demonstrate that the cost justifies the price. So the procedure is there. If the producer can justify the price, then an exemption can be had under the existing law.
>
> Mr. President, I feel very strongly that we must provide additional incentives to bring out the so-called hard-to-get oil, where the cost can be demonstrated to be a factor that warrants price adjustment. I think that is what we all seek. But should you turn around and grant a $9 per barrel increase where you cannot even come close to justifying that kind of a price exemption?

Id. at 36059.

Senator Bartlett's amendment was approved by the Senate by a final vote of 62-24. *Id.* at 36063. The House version contained no such provision. The final conference agreement also did not include this provision. *See* Joint Explanatory Statement of the Committee of Conference, *reprinted at* [1978] U.S. Code Cong. & Admin. News 8071, 8087.

Congressional Intention

After reviewing the history of the regulations and Ruling 1974-29, the district court concluded that the exclusion of injection wells conflicts with congressional intent. The primary reason articulated by the district court appears to be that excluding injection wells from the count would run contrary to the purpose of encouraging "the operation of marginally productive wells to produce oil that otherwise would not be produced." 520 F. Supp. at 1258. There is no question that continued production from stripper wells was the paramount sought after result from the exemption. Without it, the continued operation of many such wells would become economically infeasible and would have to be shut down. In a period of oil shortage, reduced domestic production was not desired. Despite this laudable objective, the Congress and the FEA both realized that the exemption also carried with it a real potential for abuse. The financial benefits to well operators to have their leases declared "stripper well" was an enormous incentive for manipulation of the exemption. The President and Congress

vested with the FEA broad authority to prevent such abuses. Prevention of such abuse and manipulation is one of the reasons for Ruling 1974-29. This concern is evident throughout the history of the exemption. It is most evident in the TAPAA Conference Report which provides:

> 15. Section 406, relating to stripper oil wells, was a Senate floor amendment to S. 1081. The Conferees have adopted the general concept of the floor amendment, but have added new provisions to insure that the exemption is narrowly defined and prudently administered, and to insure that the incentive being granted is properly limited in accord with congressional intent.
>
> * * * *
>
> The Congress intends that the provisions of this section will be strictly enforced and regulated by the administering agency to insure that the limited exemption of this class of wells for the express purposes described above is not in any way broadened. To achieve this, Congress authorizes on-site inspections to insure compliance. Congress also directs that the administering agency shall promulgate regulations to implement the provisions of this section before it becomes operative. The Conferees expect the administering agency to utilize State data regarding production volumes, and to provide by regulation safeguards against the manipulation of gerrymandering of lease units in a manner that evades the price control and allocation programs.
>
> These regulations shall be so designed as to provide safeguards against any abuse, over-reaching or altering of normal patterns of operations to achieve a benefit under this section which would not otherwise be available. Congress specifically intends that the regulations shall, among other things, prevent any "gerrymandering" of leases to average down high production wells with a number of low production stripper wells to remove the high production wells from price ceilings. The *sole* purpose and objective of this Section 406 is to keep stripper wells—those producing less than ten barrels per day—in production and to insure that the crude oil they produce continues to be available for U.S. refineries and U.S. consumers. It

> is not intended to confer any benefit on the owners and operators of wells producing in excess of ten barrels per day.
>
> The Congress also intends that the regulations provide appropriate limitations and provisions in the definition of "lease" to insure that an administratively workable system is established which does not permit abuse.

TAPAA Conf. Rep. at 2531-33. A failure on the part of FEA to take action would have been a breach of its assigned responsibility to eliminate the potential for abuse. Injection wells were an area of possible abuse and the FEA acted accordingly. Their exclusion was within the scope of congressional intent and agency authority. *See Grace Petroleum Corp.* v. *Department of Energy*, 456 F. Supp. 945, 949-50 (W.D. Okla. 1978).

Another important factor to consider is the original intended scope of the exemption. At the time the stripper well exemption was first enacted in 1973, it was clear to Congress that a relatively small percentage of this country's total oil production would be affected. Congress was legislating an exemption from price controls for only that "11.2 per cent of our domestic oil production," 119 Cong. Rec. 23873 (1973), or that "very small percentage of the crude that is available for refining purposes." *Id.* at 23876. Even the strongest proponents of the exemption recognized the rather limited scope of the exemption. During Senate debate of the TAPAA, Senator Bartlett stated that:

> A stripper well is a low productivity, marginally economic well. It can produce just enough oil to remain above the break-even point. By definition a stripper well averages 10 barrels of oil per day or less. These wells provide 1.25 million barrels of oil per day. . . . In 1972, stripper wells accounted for 11.2 per cent of our domestic oil production.

119 Cong. Rec. 23873 (1973). During that same debate, Senator Cook of Kentucky stated:

> I do not think there is any question about the fact, if we are talking about stripper wells with production of 10 barrels a day and less, that we are talking about a very

> small percentage of the crude that is available for refining purposes.

Id. at 23876. It is obvious from the congressional debates on the TAPAA and the EPAA that the exemption was to have a narrow range of applicability. Any broader exemption would render the price controls on oil practically meaningless. Interestingly, nowhere in the statutes or the governing Conference Report is there to be found even a mention of injection wells.

The appellees in this case admit that they seek an exemption which would have an impact far in excess of that ever contemplated by Congress. During oral argument, their counsel stated:

> In 1973 and for many, many years, secondary recovery of oil, which is what we are dealing with here, constituted 30 to 50% of this nation's oil production. The evidence in the record is that in 1973 alone secondary recovery by means of waterflood operations, accounted for over one billion barrels of oil being produced in this country, and for an agency which is regulating oil production to say that they were not required to foresee how that regulation would impact on one half of the production that they are regulating is absolutely ludicrous.

The amount of oil subject to the exemption under appellees' interpretation is much greater than originally anticipated and intended. Such an expansion might very well have been desired by Congress under the oil market conditions which prevailed following enactment. But such an interpretation on our part would conflict with the clear intention expressed when the exemption was first created. If an expansion in coverage was intended to include injection wells in the count, it was for the legislature and not this court to now do so.

From 1973 to 1977, the FEA applied a single and unequivocal interpretation of the stripping well regulations. Even after the exemption was repealed and reenacted, Congress did not choose to modify Ruling 1974-29 even though it had the opportunity to do so. While the district court practically ignored this

fact, we consider it a significant and probative indication of Congress' approval of Ruling 1974-29.

When we add to that the fact that the Conference Committee on the Energy Tax Act of 1978 (Pub. L. No. 95-618, 92 Stat. 3174) refused to accept the Bartlett amendment contained in the Senate version of the bill, which amendment would have amended the definition of stripper oil to include water and other injection wells in computing the average daily production per well, we are presented with clear and convincing evidence that Congress intended to include only "wells that produced crude petroleum" when it enacted and reeacted the stripper well exemption. We also cannot help but recognize that prior to the reenactment of the stripper well exemption in the ECPA, the EPAA had been extended three times without disturbing or modifying Ruling 1974-29. *See* Pub. L. No. 93-511, 88 Stat. 1608 (1974); Pub. L. No. 94-99, 89 Stat. 481 (1975); Pub. L. No. 94-133, 89 Stat. 694 (1975). By these actions, we believe Congress spoke loudly, clearly and unequivocally that its intention was not to enlarge or expand upon the "narrowly defined and prudently administered" exemption which it had originally mandated in the TAPAA Conference Report.

"Arbitrary and Capricious" Finding

As an alternative holding, the district court concluded that the exclusion of injection wells was arbitrary, capricious and an abuse of discretion. This paragraph summarizes the court's position on this issue:

> Based on this undisputed record, the Court must conclude that to the extent that the regulation excludes injection wells from the well count, it was issued in a manner which was arbitrary, capricious, and a gross abuse of discretion. The record discloses that the exclusion contained in the regulation was not the result of any semblance of reasoned decision making, but rather was the result of happenstance, and an unintended construction of language contained in the regulation. The agency failed to consider any factors which could be deemed relevant. The agency failed to consider any facts. The agency did not

> consider whether excluding injection wells would further or hinder the congressional purposes underlying the stripper well exemption. Bluntly stated, neither ignorance of the subject matter nor vacuity of thought processes can amount to consideration as a thought process accomplishment of a government agency. The agency's process in arriving at the regulatory exclusion of injection wells must be deemed "arbitrary" under any construction of that word.

520 F. Supp. at 1272 (footnote omitted). It is obvious from a reading of the court's opinion that it simply disagreed with the FEA's interpretation of the stripper well exemption regulation. But disagreement is not the standard of review to be applied. The district court has misapplied the correct standard of review in reaching its decision and misconstrued existing precedent. The most appropriate place to begin is with this court's two previous decisions in this matter.

Energy Reserves I and Duncan v. Theis

Neither of our previous decisions in this matter expressly ruled on the validity of Ruling 1974-29. Nevertheless, the discussion of the court in each case fully establishes the error of the district court's decision. In *Energy Reserves I*, Judge Becker stated that:

> The interpretation of § 406 of TAPAA and § 4(e)(2)(A) of EPAA to exclude injection wells in computing "average daily production" was a *reasonable contemporaneous construction* of the statute and created no new law or legislative rule.

589 F.2d at 1098 (emphasis supplied). Judge Becker also added:

> There is no fundamental unfairness in the application of Ruling 1974-29 because it is a *reasonable interpretation* of the stripper well exemption of EPAA, TAPAA and the regulation 10 C.F.R. § 212.32(b).

Id. at 1101 (emphasis supplied). And in his concurring opinion, Judge Christensen importantly expressed his view that:

> And a holding that "a well which produced crude petroleum" means, as contemplated by the properly adopted

> and subsisting regulations and in view of the seminal statute, a well that produces or yields such petroleum directly rather than one which may be utilized as part of a system to obtain indirectly crude petroleum from a producing well, *seems essentially the sort of an interpretation that must have been intended by the APA exception to the rulemaking requirement.*

Id. at 1103 (emphasis supplied).

In *Duncan* v. *Theis, supra*, we sought to reemphasize our views as we remanded the case to the district court for its determination of those enumerated remaining issues. We stated:

> In sum, the present situation is that the consistency of Ruling 1974-29 with the APA has been finally established and, in connection with the ruling on the issue before the court and particularly in dealing with the question of substantial impact, both judges concurring in the result clearly indicated the majority view that the ruling in question did not represent any substantial departure from the meaning of the regulation, and for this reason had no substantial impact as an interpretive ruling. Whether the regulation itself was within the authority of the FEA to promulgate, despite its conceded procedural regularity, or whether it was arbitrary or capricious does not so clearly appear from a consideration of the decision as a whole.
>
> The unjustified unwillingness of the government on the one hand to acknowledge this differentiation in its effort to block all further proceedings before Judge Theis by way of discovery or otherwise, and on the other hand the mistaken position of some of the plaintiffs that our decision essentially settled nothing, or at most only the issue of "procedural validity" as affecting the parties involved in the appeal, may account in some measure for the difficulties the lower court and the parties now profess to see within our mandate. Yet, it was rendered clear during the oral argument on the petition for mandamus now before us that the decision of this court set at rest the question of the compliance of the ruling in question with the APA because

> it was simply a restatement of the meaning and effect of the regulation on which it was based.

613 F.2d at 308 (footnotes omitted). In an effort to avoid any misunderstanding regarding the specific reason for our denial of the petition for mandamus relief, we wrote:

> In so withholding the peremptory writ we do not mean to be understood as accepting or suggesting that the binding meaning and effect of the mandate is limited to express or formally mandatory language as distinguished from its reasonable meaning, spirit and effect in context of the decision agreed upon by the majority of the judges of the court, that our decision, even though involving the main, concurring and dissenting opinions, is not mandatory and binding upon remand in the light of context, spirit, unity of opinion and reasonable effect, that as to refiners who were not parties to the appeal, but who are now before the same court in essentially the same position as those who were, the doctrine of *stare decisis* is not controlling upon the district court, nor that interlocutory injunctions or discovery programs inconsistent with a mandate or repugnant to a proper application of the doctrine of *stare decisis* are beyond the reach of a peremptory writ or other remedy.

Id. at 310-11 (footnotes omitted). Thus, while not expressly holding that Ruling 1974-29 is fully valid, there should have been no serious doubt that the court believed such was the case. Contrary to the belief of Judge Theis that the panel in *Energy Reserves I* was merely "sounding off," *see* 613 F.2d at 310 n.11, the discussion and analysis of all three judges, while not binding on other courts, represent authoritative interpretations of Ruling 1974-29. They speak all too clearly on the very issue the district court was asked to decide.

This view, as well as our final holding in these cases, is completely supported by this Court's recent decision in *Wiggins Brothers, Inc.* v. *Department of Energy*, 667 F.2d 77 (Temp. Emer. Ct. App. 1981), *cert. denied*, ____ U.S. ____, 50 U.S.L.W. 3783 (1982), a case practically on all fours with this case. The issue there was "simply whether, under a proper construction of the Marginal Property Rule [10 C.F.R.

§ 212.72 (as amended effective June 1, 1979)], injection wells may be counted 'as wells that produced oil.' " *Id.* at 87. Just as is the case here, the regulation fails to define the key phrase "wells that produced oil." The district court construed this phrase as including injection wells based upon its "plain meaning." *Id.* at 81-82. In reaching that decision, the district court gave considerable weight to the industry's interpretation as well as the treatment which had been given injection wells by other energy regulatory bodies. *Id.* at 82. The district court also disregarded the preamble to the rule in favor of the rule's plain meaning. *Id.* That preamble, published in the Federal Register, incorporates Ruling 1974-29, the centerpiece of this appeal.

Writing for this court in *Wiggins*, Judge Becker concluded "that injection wells may not be counted as 'wells that produced oil' in the application of the Marginal Property Rule." *Id.* at 87. Paramount in the court's reasoning was the "clearly expressed" and "obvious intention" of the DOE to exclude injection wells from the count. Ruling 1974-29 was found to be controlling as well as a definition of "average daily production" which specified that it "must be determined in the same way as it is done for stripper well properties, and the provisions of the relevant stripper well property rulings will be applicable. . . ." *Id.* at 87. The opinion makes undeniably clear that the Marginal Property Rule is to be interpreted in the same manner as the stripper well exemption which the court correctly understood as excluding injection wells. In three separate passages, the court found dispositive our earlier rulings in *Energy Reserves I* and *Duncan* v. *Theis*, *supra*.

> Finally, the prior decisions construing the interpretative stripper well Ruling 1974-29 to be consistent with a similar underlying statute are decisive. *Energy Reserves Group, Inc.* v. *DOE*, 589 F.2d 1082 (Em.App. 1978), clarified in *Duncan* v. *Theis*, 613 F.2d 305 (Em.App. 1979).

667 F.2d at 89.

> The critical phrase "average daily production" had earlier acquired a meaning by administrative interpretation

> in Ruling 1974-29 that excluded injection wells in calculating whether average daily production was 10 barrels or less for the purpose of the statutory stripper well lease exemption and regulation 10 C.F.R. § 210.32(b) (the latter of two consistent implementing regulations). *Energy Reserves Group, Inc.* v. *DOE*, 589 F.2d 1082 (Em.App. 1978), clarified in *Duncan* v. *Theis*, 613 F.2d 305 (Em.App. 1979).

Id.

> The reported practices and interpretations of state regulatory commissions and the Department of Interior for other purposes, relied on by the District Court, are not effective to rebut the contrary meaning and administrative interpretation of the Marginal Property Rule by DOE. This was expressly held in *Energy Reserves Group, Inc.* v. *DOE*, 589 F.2d 1082, at 1098-1099 (Em.App. 1978), clarified in *Duncan* v. *Theis*, 613 F.2d 305 (Em.App. 1979).

Id. at 90. While the district court below experienced difficulty in understanding the interpretations given Ruling 1974-29 in *Energy Reserves I* and *Duncan* v. *Theis*, this court in *Wiggins* did not. We agree with *Wiggins*' analysis of Ruling 1979-29 and conclude that injection wells are not to be counted for purposes of the stripper well exemption. The agency's interpretation of the stripper well is neither "plainly erroneous [n]or inconsistent with the regulation." *Wiggins*, 667 F.2d at 88 (cites omitted).

Justification for Ruling 1974-29

The district court attacked with unrestrained vigor the reasonableness of Ruling 1974-29. 520 F. Supp. at 1272-73. In its view, there was no logical reason for distinguishing injection wells from producing wells. We note the district court's reliance on industry practices in reaching its decision, but under the "arbitrary and capricious" standard we must apply, we do not believe Ruling 1974-29 is invalid for several reasons.

The most important reason has already been articulated. Including injection wells in the count could possibly lead to a

serious abuse of the purposes of the exemption. A lease operator could be encouraged to convert old abandoned wells or to drill additional injection wells to obtain the benefits of the exemption. The financial benefits resulting from the exemption of an entire leasehold from price controls could significantly exceed the costs of the injection wells. This scenario was surely not desired by Congress. It would be grossly unfair to suggest that injection wells would spring up all over the country if injection wells were included in the well count, but it is not unreasonable to suggest that such a result could occur. Ruling 1974-29 eliminates any potential for such abuse. Perhaps it could be considered an extreme measure but it is not arbitrary or capricious.

The core of appellees' argument is that injection wells are "wells that produced crude oil" under the regulation. A plain reading simply does not support that conclusion. At minimum, a reasonable reading would distinguish injection from producing wells. *See Grace Petroleum, supra*, 456 F. Supp. at 949. An injection well is a secondary recovery technique, and such techniques were not considered by Congress when creating the exemption and drafting the language of the statutes. Congress had numerous opportunities to modify the exemption to include injection wells in the count but consistently refused to do so. For the court to interpret the language to include them would constitute a flagrant disregard of a clear and contrary congressional intention.

The district court's error in its decision is its total reliance on production incentives. It fails to adequately weigh the other side of the coin. Price controls on oil was the fundamental purpose of the legislation. It is obvious that Congress in no way intended to create an opportunity for mass evasion of those controls. The stripper well exemption was designed as an extremely limited and narrow exemption, and the DOE interpretation gives full effect to this intent. There is no reason in this case not to give the agency's own construction of its regulation great deference, *see Udall* v. *Tallman*, 380 U.S. 1 (1965); *Pasco, Inc.* v. *Federal Energy Administration*, 525 F.2d 1391

(Temp. Emer. Ct. App. 1975), especially so here inasmuch as we find the agency's interpretation reasonable. *Energy Consumers and Producers Association, Inc.* v. *Department of Energy*, 632 F.2d 129 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980). We are not the legislative body responsible for this nation's energy policies. The wisdom or lack thereof of Ruling 1974-29 is properly left with the Congress. Our review is a narrow one and we will not unnecessarily and improperly intrude upon the public policy decisions made by the other branches of Government. Simply stated, there is nothing about Ruling 1974-29 which renders it arbitrary or capricious. It reasonably attempts to effectuate the congressional policies expressed throughout that body's numerous efforts to formulate and implement an effective national energy policy.

Conclusion

In summary, we find:

1) The legislative history of the stripper well exemption amply supports the DOE's position that injection wells were not intended by Congress to be included in the well count;

2) Ruling 1974-29 is not beyond the authority of the DOE granted by the controlling statutory provisions;

3) Our prior decision in *Energy Reserves I*, *Duncan* v. *Theis* and *Wiggins* have correctly decided that Ruling 1974-29 is a reasonable interpretation of the applicable statutes and regulations; and

4) The stripper well regulations, as interpreted by Ruling 1974-29, are neither arbitrary nor capricious.

For all these reasons, the decision of the district court is reversed, and these consolidated cases are remanded to the district court with instructions to enter judgment for the defendants-appellants.

APPENDIX B

In re THE DEPARTMENT OF ENERGY
STRIPPER WELL EXEMPTION
LITIGATION.

ENERGY RESERVES GROUP, INC. Suburban
Propane Gas Corporation, Marathon Oil Company and Sklar
& Phillips Oil Company

v.

DEPARTMENT OF ENERGY, *et al.*

SIERRA PETROLEUM CO., INC.

v.

DEPARTMENT OF ENERGY, *et al.*

BRADEN-ZENITH, INC. and The Estate of
S. H. Killingsworth

v.

DEPARTMENT OF ENERGY, *et al.*

MOBIL OIL CORPORATION, Mobil Producing
Texas & New Mexico, Ind. and Willie Ansley Bryson

v.

DEPARTMENT OF ENERGY, *et al.*

STELBAR OIL CORPORATION, INC., The Standard
Oil Company, Ohio and Theo M. Glenn, Jr. and Eleanor Glenn

v.

DEPARTMENT OF ENERGY, *et al.*

Robert Dale BRANDENBURG
and Texaco, Inc.

v.

DEPARTMENT OF ENERGY, *et al.*

AMIN OIL, INC.

v.

DEPARTMENT OF ENERGY, *et al.*

Otis C. PEAVEY, *et al.* and Sun Oil Company (Delaware)

v.

DEPARTMENT OF ENERGY, *et al.*

Howard STOUT, Lorena Houlton and Mary E. Hall, Co-Trustees of the Charles S. Page Trust and Gulf Oil Corporation

v.

DEPARTMENT OF ENERGY, *et al.*

Robert E. DAVIS and Energy Consumers & Producers Association, Inc., Ruthven, Inc., Pioneer Operations Company, Inc.

v.

DEPARTMENT OF ENERGY, *et al.*

George R. JONES, *et al.*

v.

DEPARTMENT OF ENERGY, *et al.*

PETROLEUM MANAGEMENT, INC.

v.

DEPARTMENT OF ENERGY, *et al.*

ATLANTIC RICHFIELD COMPANY

v.

DEPARTMENT OF ENERGY, *et al.*

W. R. MURFIN, d/b/a Murfin Drilling Company, and Champlin Petroleum Company

v.

DEPARTMENT OF ENERGY, *et al.*

UNION OIL COMPANY OF CALIFORNIA

v.

DEPARTMENT OF ENERGY, *et al.*

COASTAL STATES GAS CORP., Coastal States Gas Producing Co., and Gas Producing Enterprises, Inc.

v.

DEPARTMENT OF ENERGY, *et al.*

EXXON CORPORATION

v.

DEPARTMENT OF ENERGY, *et al.*

CONTINENTAL OIL CO.

v.

DEPARTMENT OF ENERGY, *et al.*

HUNT OIL COMPANY

v.

DEPARTMENT OF ENERGY, *et al.*

CRYSTAL OIL COMPANY and Ira Thomas May

v.

DEPARTMENT OF ENERGY, *et al.*

MUSKEGON DEVELOPMENT CO.

v.

DEPARTMENT OF ENERGY, *et al.*

OKLAHOMA ASS'N OF ENERGY CONSUMERS & PRODUCERS

v.

DEPARTMENT OF ENERGY, *et al.*

Paul B. FLETCHER, Sr. and Anadarko Production Company

v.

DEPARTMENT OF ENERGY, *et al.*

IU INTERNATIONAL OIL & GAS, INC.

v.

DEPARTMENT OF ENERGY, *et al.*

WOOD OIL CO. and Dan Wallace d/b/a Columbus Oil Co.

v.

DEPARTMENT OF ENERGY, *et al.*

WILL I. LEWIS ENTERPRISES, INC.

v.

DEPARTMENT OF ENERGY, *et al.*

Jimmie AUSTIN d/b/a Austin Drilling Company

v.

DEPARTMENT OF ENERGY, *et al.*

SANTA FE ENERGY COMPANY

v.

DEPARTMENT OF ENERGY, *et al.*

George G. ANDERMAN and Donald R. Kirby

v.

DEPARTMENT OF ENERGY, *et al.*

Patricia Anne LEONARD, *et al.*

v.

DEPARTMENT OF ENERGY, *et al.*

FARMERS PETROLEUM COOPERATIVE, INC.

v.

DEPARTMENT OF ENERGY, *et al.*

KIRKWOOD OIL & GAS COMPANY

v.

DEPARTMENT OF ENERGY, *et al.*

PETROLEUM CORPORATION OF TEXAS

v.

DEPARTMENT OF ENERGY, *et al.*

Civ. A. Nos. 77-1146, 77-1087, 76-429-C6, 78-1070, 78-1176, 78-1230, 79-1387, 78-1410, 78-1513, 77-1456, 78-1235, 78-1509, 79-1204, 79-1258, 79-1318, 79-1319, 79-1320, 79-1321, 79-1322, 79-1325, 79-1384, 79-1385, 79-1386, 79-1388, 79-1389 and 79-1416.

MDL No. 378.

United States District Court, D. Kansas

July 14, 1981.

THEIS, Chief Judge.

These multidistrict litigation (MDL) cases now come on for final decision of the Court. Trial of these cases, after extensive

pretrial proceedings and litigation involving two appeals by the defendants to the Temporary Emergency Court of Appeals (TECA), was finally held to this Court from January 19, to February 6, 1981. After considering the evidence presented at trial, and after studying the briefs of the parties, and reviewing the appellate decisions in the consolidated cases, the Court enters this opinion.

A brief review of the pretrial proceedings may be illuminating and certainly, in this Court's opinion, accounts for the singularly bellicose and adamant efforts of the Government, through their various counsel, to resist trial on the merits of the issue of law common to all of these cases. Originating as a single case to enjoin as illegal the governmental enforcement of the regulations of the then Federal Energy Administration (FEA), now Department of Energy (DOE), prohibiting those plaintiff oil companies from including fluid injection wells in a well count to establish pricing levels for crude oil produced from stripper wells on plaintiffs' leases, under a stripper well exemption in the legislative act, other cases were soon filed which were consolidated into one action. These cases were ruled on by this Court in its decision reported in *Energy Reserves Group, Inc.* v. *Federal Energy Administration*, 447 F. Supp. 1135 (D.Kan.1978), which held FEA Ruling 1974-29, excluding the count of injection wells, was legislative in nature rather than interpretive of the regulation, and therefore void. This decision was appealed to the Temporary Emergency Court of Appeal, resulting in a reversal of the Court's decision in a 2 to 1 decision of the three learned judges of TECA, in which each judge rendered a separate opinion. This decision is reported as *Energy Reserves Group, Inc.* v. *Department of Energy*, 589 F.2d 1082 (TECA 1978). In short summary, the TECA majority held valid Ruling 1974-29 as a reasonable interpretation of the regulation implementing the statutory stripper well exemption, and remanded for trial the issue of whether the regulation was valid under the intent of Congress as expressed in the statute and its legislative history, and whether the regulation was arbitrarily and capriciously

adopted by the administrative agency. By this time case litigation was burgeoning on the identical issues in many other federal court districts and forwarded to this district and combined for disposition of this Court as multidistrict litigation under order of the Judicial Panel of Multidistrict Litigation in June, 1979, reported as *In re Dept. of Energy Stripper Well Exemption Litigation*, 472 F. Supp. 1282 (1979). Governmental resistance to this Court's efforts to get the case ready for trial and its unilateral insistence that the litigation had been terminated by TECA in the 1978 appeal, resulted in yet another appeal to mandamus this Court, reported as *Duncan, Sec'y. of Energy* v. *Theis, Chief Judge*, 613 F.2d 305 (Em.App.1979). TECA rejected the government counsels' contention that TECA had decided this case in its prior opinion, and that there was no subject matter for litigation and decision. After continued resistance by the government at every stage of the pretrial discovery proceedings, trial finally began on January 19, 1981.

The government's theory of absolutism in the rightness of its conduct, its refusal to recognize the adversarial aspect of our legal system, and general truculence, are aptly illustrated by an early assertion in its Post-Trial Brief, wherein it is stated: "Although the trial held in this matter was extremely improper and unnecessary . . ."

Generally, the whole history of this litigation has been the government's premise that its administrative decisions are judicially unreviewable, and the minds and actions of the administrative decision-makers may not be probed to determine the basis for such action. This position has been vigorously and adversarily disputed by an array of competent counsel from some of the leading law firms around this nation. As a result of an earlier injunction order in this case there has been accumulated in trust under court supervision a fund approximating one billion dollars, which awaits judicial distribution upon the termination of this litigation.

The issues now before the Court in the trial and for decision are: (1) whether the regulation itself, interpreted by TECA as excluding injection wells from the well count, was reasonable and valid within congressional intent of the statutory exemption; and (2) whether the promulgation of the regulation (C.F.R. 154(s)), was arbitrary and capricious. Since the inception of this litigation these two issues have always been the principal underlying legal points for ultimate decision.

To better understand the parameters of this dispute the Court considered engineering facts underlying crude oil production generally and secondary recovery in particular, various state procedures governing secondary recovery, and the treatment of injection wells in secondary projects under certain federal programs. The Court's conclusions with respect to these matters constitute the first portion of this opinion.

The Court then sets out the controlling statutes, regulations and ruling. This section is followed by the holding of this Court that Congress intended injection wells to be included in the well count, and a lengthy explanation as to how the Court reached this conclusion and why the DOE's contrary position is not binding on the Court.

The Court then concludes that even if the statute did not mandate including injection wells, the manner in which the Department excluded the wells from the well count was arbitrary and capricious.

For those reasons, the Court has found that the stripper well exemption regulation, as interpreted by Ruling 1974-29, is invalid and must be struck down. The Court, in this opinion, has also ruled on certain post-trial motions, and these rulings are contained in part V of this opinion and order.

I. FACTUAL AND REGULATORY BACKGROUND

The organic theory of the origin of oil is accepted by 99.9% of engineers. (Whiting, T. 132033).[1] This theory holds that oil came from organisms that lived in and adjacent to inland seas during geologic times. Plant and animal residues were deposited in these inland seas and over time were covered with sediment and subjected to great heat and pressure. (Whiting, T. 139). This heat and pressure "destructively distilled" those organisms and generated petroleum. (Id.) This petroleum then is believed to have migrated from the place it originated, the source beds, through very small pores in the underground rock until it was caught in some kind of geologic "trap" which prevented further migration. Three of these geological traps are illustrated in P.X. 1-14 through P.X. 1-17. Oil caught in such a trap constitutes an oil reservoir.

The rock formations which contain this oil must possess two characteristics to allow the oil to move within the reservoir. The rock must have "porosity" and "permeability." Porosity is an indication of the storage capacity of a rock. (Whiting, T. 140.) Porosity must be present to have an accumulation of oil. (Whiting, T. 141.) Porosity is the measure of the microscopic pore spaces between the grains of sand in the rock formation. An artist's conception of this characteristic is shown on P.X. 1-9. Permeability occurs where microscopic pore spaces are interconnected in a manner such that oil can move through the rock. The rock must have permeability in order to transmit oil. Samples of the type rock which contain the oil in the underground reservoirs are shown in P.X. 170-171.

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[1] The Court will refer to citations to the trial transcript by citing the witness and the page in the transcript, e.g., (Whiting, T. 132-33.) Depositions will be cited similarly, only "D." will be used to denote deposition testimony. Plaintiffs' exhibits are cited "P.X." and the number. Defendants' (Government's) exhibits are cited "G.X." and the letter.

The production of oil is the process of forcing the oil from the rocks in which it is found into a well bore for transportation to the surface. Primary recovery is an oil recovery process which utilizes the natural energies in a reservoir to displace the oil from the reservoir into the well bore of an output well. (Whiting, T. 154.) The three major forms of natural energy within an oil reservoir are the "gas cap drive," the "natural water drive," and the "solution gas drive." These three naturally occurring drive forces are illustrated in P.X. 1-20, 1-22 and 1-21.

"Gas cap drive" occurs where a quantity of undissolved gas exists within a reservoir. When a recovery well is completed in the formation, the pressure from the free gas forces the oil into the well bore through which it is transported to the surface. As the recovery continues, the gas cap expands to displace oil in the rock pores and force the oil into the recovery well bore. (Whiting, T. 160.)

A natural water drive reservoir occurs where there is a water reservoir underlying the oil reservoir. In this situation, as oil is withdrawn from the reservoir, the water underlying that oil forces itself up, displacing oil as it expands into the oil bearing formation, forcing the oil into the recovery well bore.

Solution gas, or dissolved gas drive, is the third primary drive mechanism. Because of the high pressures naturally occurring within an oil reservoir, natural gas is forced into solution in the oil. When a recovery well is completed the reservoir pressure is reduced, and the dissolved gas begins to come out of solution. The process is the same as when a bottle of a carbonated beverage is opened. When the cap is taken off, some of the dissolved carbon dioxide within the beverage comes out of the liquid. When the gas in the reservoir comes out of solution, it expands and forces oil out of the pore spaces in the rock and into the well bore. (Whiting, T. 155-56.) The point at which dissolved gas begins to come out of solution is referred to as the "bubble point."

There is a limit to the amount of oil that can be recovered utilizing the naturally occurring reservoir energy. A natural

gas cap or natural water drive allows for the recovery of 20 to 50 percent of the oil contained in the reservoir. (Whiting, T. 169, 170.) A solution gas drive mechanism allows for the recovery of 15 to 25 percent of the oil contained in the reservoir. (Whiting, T. 169; O'Neal, T. 268.)[2]

Secondary recovery is a recovery process in which the naturally occurring reservoir energy is augmented by additional energy in the form of matter injected into the producing formation. (Whiting, T. 163.) A water injection system increases the production of oil in two ways. First, the injection helps to maintain the pressure within the reservoir. The injection process provides the power to move oil through the reservoir to the recovery well. Second, water injected into an oil reservoir physically displaces the oil and moves it toward the recovery well. Water injection has been recognized for about fifty years as an accepted efficient method of augmenting oil recovery. (Whiting, T. 164.)

A water injection recovery system requires at a minimum two oil wells. One well is the injection well and is used as a vehicle to inject water into the oil formation. The other well is the recovery well and is used as the conduit to remove the oil forced into the well bore. Typically, an injection well is a former recovery well which has been converted to injection. Physically, there is little difference between the structure of an injection well and the structure of a recovery well. Plaintiffs' Ex. 35, which is attached to this opinion as Appendix "A," shows the similarity of physical structure between a typical injection well and a typical recovery well.

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[2] Drive mechanisms should not be confused with lift mechanisms. Lift mechanisms are the devices utilized to transport the oil from the bottom of the well bore to the surface. Drive mechanisms are the means of forcing the oil through the rock into the well bores. Various means of lifting the oil are available, the specifics of the devices are not important to the resolution of this case.

From an engineering standpoint, there is an appropriate time at which to initiate waterflooding so as to maximize recovery from a reservoir. (Whiting, T.172). The optimum time, however, the "bubble point," is that time at which the dissolved gas in the oil starts to come out of solution. Delay in initiating injection past the "bubble point" decreases ultimate recovery, since the mobility of the oil decreases. (Whiting, T. 177.) Recovery lost because of slow initiation of secondary recovery can never be recaptured by use of primary recovery or waterflooding. Delays past the optimum point in initiating waterflooding cause an absolute decrease in recoverable oil reserves. The early initiation of injection also results in less recovery than in a properly waterflooded field, since the natural displacement power of the dissolved gas is wasted. (Whiting, T. 173, 175.)

The increased recovery resulting from water injection is shown on P.X. 1037 to P.X. 1-40. The increased recovery is normally expected to be from 67 to 150 percent of the amount of oil recovered using primary methods. (O'Neal, T. 268, 311.)

Institution of a secondary recovery project using waterflooding is a complex and expensive undertaking. Before initiating waterflooding, a producer must determine whether an oil-bearing formation is suitable for secondary recovery. Dissolved gas drive reservoirs seem to be the best candidates for secondary recovery, since the natural energy is more quickly dissipated, leaving more oil in place. (Platt, T. 698-99; Whiting, T. 170.) The engineers and geologists must make laboratory studies to determine if additional oil could be recovered by injection of fluid into the reservoir. (Platt, T. 700.)

If it is found that water injection would be beneficial, then the entire oil field must be "unitized." Different portions of an oil field may be leased by different companies. Efficient waterflooding requires that the entire reservoir be under a single plan. Unitization is the process through which the various leaseholders are brought into one entity for the exploitation of the field. (O'Neal, T. 246-47; Platt, T. 703.)

A producer must obtain a source of water to inject into the reservoir. Fresh water might be obtained from a river, as was done in the Salem Unit (Eley, T.400), or from wells, as was done in the Northwest Cha Cha Unit (Shearin, T.544). Salt water might be obtained from a variety of sources (Platt, T.701). While the costs of obtaining the water vary, they may be high. The water from the water supply must be chemically treated and filtered to be suitable for injection. (See P.X. 28.) Injection of water which is not compatible with water already present in a reservoir could cause a plugging of the pore space in the oil-bearing rocks, which in turn could prohibit continued injection, or otherwise be detrimental to the recovery process. (Platt, T.708; Burt, T.1035-36.) The water is injected at high pressures which could vary between 1000 p.s.i. and 6000 p.s.i. (Platt, T.709.) These injection presures require large injection pumps. (McConnell, D.18.) (See, P.X. 41, P.X. 29-2.)

Wells to inject the water must either be drilled, or recovery wells must be converted to injection wells. Costs of drilling an injection well are comparable to the costs of drilling a recovery well. (McConnell, D.17.) The conversion of wells from recovery wells to injection involves first performing remedial work on the recovery well. (Platt, T.710; P.X. 35.) Next, tubing is placed in the well casing and a packer is placed around the bottom of the tubing. (Platt, T.711.) A well head sufficient to withstand the high pressures is installed on the top of the well. (Id.)

Various patterns of the placement of injection wells can be used in a secondary recovery project. The pattern which is selected depends upon the geologic characteristics of the reservoir, such as the permeability of the rock, the reservoir pressure and the oil characteristics. (O'Neal, T.269.) Recognized patterns include the peripheral flood pattern (O'Neal, T.270; P.X. 7), the five spot flood pattern (O'Neal, T.270-1; P.X. 8), and the inverted nine spot pattern (O'Neal, T.271; P.X. 8). The five spot and the nine spot pattern result in an injection well to recovery well ratio of one to one and one to three, respectively. (O'Neal, T.270-71.)

Long pipelines for transporting the water from its source to the treatment plant to the injection pumps and then to the injection wells may be required. These pipelines may need to be specially treated to withstand corrosive forces and the high pressures associated with the injection process. (Platt, T.709, 710.) Other facilities may be necessary for separation of oil from the water lifted by the recovery wells. Facilities may be necessary for preparing recovered water for reinjection, or disposing of recovered water in some other manner.

The important contribution that oil recovered through waterflooding operations makes to the oil needs of this country, and the necessary role of injection wells in that process, is undisputed. In 1973, approximately one billion barrels of oil were produced through the injection process. (Platt, T.722-23.) Thirty to fifty percent of all oil produced in the United States was attributable to fluid injection projects. (Platt, T.743.) The injection well is a necessary and indispensible ingredient in the secondary recovery process. Professor Whiting, on cross-examination, was asked:

"Q. When you testified that an injection well is a producing well or a well that produces crude oil, didn't you mean in fact what you means is that it assists in the emitting of oil by the production well, the recovery well, at the surface of the earth?

A. I will say once again—and I guess other times if you insist on it—I teach my students that there is no question about the fundamental premise that there are three necessary parts of a secondary recovery system. Elements of it. The reservoir, the input well, and the production well—using your words. All of those are essential ingredients, and I think I should answer your question by saying without an injection well in secondary recovery there would be no oil production into the well bore of the production well you are talking about. *It is an essential ingredient of the system. Without an injection well*

you don't have secondary recovery. This has been recognized I know for 40 years." (Emphasis added.)

(Whiting, T.193.) The Government expert, Mr. Burt, agreed with Professor Whiting, as follows:

"Q. Right. And, therefore, wouldn't you agree that an injection well is an absolute and necessary essential part of a secondary recovery waterflood producing system?

A. I don't think I ever said otherwise. I've always said it was essential to have an injection point."

(Burt, T.1062-63.) Mr. O'Neal testified that injection wells and recovery wells are "hydraulically linked." He explained:

"A. 'Hydraulic linkage' is merely a form of reservoir communication in one sense. As I mentioned before, we started out with a tiny sample of rock that is in a reservoir that is in a stannic conduit, the pore spaces, but those things are connected, they are not efficient pipelines, but they are connected from one end of the reservoir to another. And that is what you are able to utilize in conducting a waterflood, is that you use that communication, and then by injecting water into the well on the left you force that water out into the oil-bearing formation, and that provides the energy to move the oil and the water, and it also is sweeping the oil out of those pore spaces.

Q. All right. Mr. O'Neal, as I understand it, then, there is an hydraulic linkage between the injection well here and the recovery well here, is that correct?

A. That is correct. Those two wells are used in pairs."

(O'Neal, T.273-74.) The relationship described is rather like a pipeline with the injection well acting as one end and the recovery well acting as the other end. Nothing can flow out of the one end of the pipeline in the absence of something being forced into the other end. An injection well provides the force. On cross-examination the witness clarified this relationship:

"Q. Now you testified in response to a question by Mr. Beck, the summary question, that producing, that

injection wells, are wells that produce crude oil. You mean by that, do you not, that they help produce crude oil, isn't that a fact?

A. No. As I said for me the injection well, number one, is a well that produces crude oil, like that which was demonstrated on the model—

. . . . .

A. All right. What I said was that an injection well forces, by the use of water, puts energy in the reservoir, and displaces oil through the reservoir and up the recovery well. And, I said more than 'assist'—I said *it was the prime mover*, because if I did not put that injection well in, I would have no more oil production." (Emphasis added.)

(O'Neal, T.351-52.) Mr. Eley testified similarly:

> "A waterflood, certainly a waterflood, such as the Salem Unit—and this unit is typical of a successful waterflood unit—I can see it as a hydraulic system, you inject water into the injection wells, and put energy in the formation which moves oil and water to your recovery wells where you recover. In the absence of water injection, you would certainly, in this field, you would have no production at all. And today, today as of October 1, 1980, our injection program has resulted in the production of an additional 118 million barrels of oil, and will ultimately produce an additional 138 million barrels of oil. Now, this is, again, oil that would not be produced in the absence of injection wells. Injection wells are an essential part of your injection operation, and certainly in this sense injection wells do produce crude oil."

(Eley, T.434.) All of these principles were clearly and graphically demonstrated through the model of the oil reservoir. Movies of this demonstration were submitted as P.X. 175 and P.X. 176.

The defendant did aptly point out that other types of wells are present on oil leases. No other type of well, however, contributes to the recovery process in the manner that both

injection and recovery wells do. These are the only two types of wells which cause oil to flow within the reservoir.

In many states, the entire process is heavily regulated. The materials submitted by the plaintiffs show that California, Colorado, Illinois, Kentucky, Michigan, Nebraska, New Mexico, Texas, Utah and Wyoming, all require producers to obtain permits prior to drilling a well for injection purposes. All of these states and Arkansas, Kansas, Montana, and Oklahoma require application and approval prior to instituting water injection. The approval necessary to institute waterflooding seems to be obtainable only after furnishing extensive studies on the feasibility of waterflooding. In Kansas, for example, an application to inject must show:

> "(1) the location of the intake well; (2) the location of all oil and gas wells, including abandoned and drilling wells and dry holes, and the names of landowners and lessees within one-half mile of the intake well; (3) the formation from which wells are producing or have produced; (4) the name, description and depth of the formations to be flooded; (5) the openhole depths of each formation to be flooded; (6) the elevations of the top of the oil-or-gas-bearing formation in the intake well and the wells producing from the same formation within one-half mile radius of the intake well; (7) the log of the intake well or such information as is available; (8) descriptions of the intake well casing; (9) descriptions of the liquid, stating the kind, where obtained and the estimated amounts to be injected daily; (10) the names and addresses of the operators notified of the application and the date that such notice was given; (11) such other information as the commission may require to ascertain the flooding may be safely and legally made."

Kan. Admin. Reg. No. 82-2-502. Other states have similar requirements. See, e.g., Rule 401, Rules and Regs. of Neb. Oil and Gas Comm.; Rule 228.3, Gen. Rules and Regs. of Oil and Gas Comm. of Montana. See also, P.X. 48, which is form H-1 of the Texas Railroad Commission and is required to be completed prior to initiation of injection.

These natural and regulatory barriers to the institution of waterflooding render the process quite expensive. Even the

defendant's expert engineer acknowledged: "The cost of a waterflood system is more than primary." (Burt, T.1073.) This fact was affirmed by other experts who testified: Shearin, T.536; McConnell, D.15-20; Platt, T.700-04. Moreover, as aptly pointed out by the Government's engineer, water injection is subject to the risk of failure. (Burt, T.1033, 37; G.X. G2-A through G2-E.)

State agencies have afforded injection wells special treatment in proration programs, to insure that their contribution to the production process is recognized. One of the goals of a system of proration or allowables is to maximize the ultimate recovery from each field, thereby preventing waste and conserving oil. (Coker, T.598; Baumel, T.663.)

This Court was treated to an extensive lesson in the method allowables are determined in Texas. The actions of the Texas regulators, the Texas Railroad Commission, are of particular interest since that oil rich state accounts for approximately one-third of the total oil production in the forty-eight continental United States. (Platt, T.723; Coker, T.624.) Mac Coker, who served the Texas Railroad Commission for 28 years, Jack K. Baumel, who worked for the Commission for 15 years, and designed the system of yardstick allowables used in Texas, and Bob Harris, who currently is director of the Oil and Gas Division of the Commission, provided the Court with a full picture of the functions of the allowable system in Texas. No individuals could possibly be more qualified to testify about the Texas practices than these three individuals, and their credibility was unsullied.

To establish an allowable for a water flood project, each well must undergo a test prior to injecting water into the formation. This test is required of all wells which are either converted from recovery wells or drilled as injection wells. (Coker, T.608.) The test required determines how much oil the well can yield in a twenty-four hour period. Thus, even if a well was drilled to be operated as an injection well, the operator must use that well as a recovery well for twenty-four hours to determine how much oil that well can recover in that period.

(Coker, T.609.) The amount of oil that the well emits in that test period is assigned to that well as its allowable. (Coker, T.610.)

When the test is completed and the wells are converted to injection wells, the allowable of those wells are transferred to other specific recovery wells on the property. (Id.) Thus, if prior to injection, an injection well has an allowable of five barrels per day, and a recovery well has an allowable of six barrels per day, the allowable of the injection well can be transferred to the recovery well so that the recovery well could extract eleven barrels per day. (Coker, T.611.)

If the waterflood operation is able to produce more oil than this allowable permits, a different set of allowables comes into play. Rule 48, Texas Railroad Commission. The first step in increasing the allowable for waterflood projects is to assign a "marginal allowable" to the wells on the property. The allowables for the injection wells are transferred to the recovery wells. If the waterflood produces more than this allowable permits, a yardstick allowable is assigned to each well, including injection wells, and the allowables from the injection wells are transferred to the recovery wells (Coker, T.638.) Other higher allowables can be assigned after a hearing and are assigned on a lease basis rather than a well basis. (Coker, T.615-619.)

Mr. Coker made clear the reasons for allowing the transfer of allowables from injection to recovery wells:

> "The transfer of an allowable concept was initiated by the Railroad Commission for two primary reasons: One, as an incentive to operators to initiate secondary recovery in order to increase the ultimate recovery from the various fields. Further, the transfer allowable concept was adopted and has been utilized for at least 40 years in recognition of the fact that the water injection wells are an integral part of the recovery system in secondary recovery projects."

(Coker, T.629.) State conservation practice recognizes the importance and necessity of secondary recovery, and the essential contribution of the injection well to secondary recovery.[3]

Louisiana has also recognized the role of injection wells in their allowable system. Not only does Louisiana allow the transfer of allowables from injection wells to recovery wells on a unit, but Louisiana also allows an extra allowable to be assigned to a property for each injection well. This bonus allowable "was an incentive for operators to initiate secondary recovery early in the life of a reservoir or earlier than might be normally done to ensure that the maximum recovery from the reservoir is obtained." (Boudreaux, D.15.)

Oklahoma and New Mexico also allow the transfer of allowables in waterflood operations. New Mexico Oil Conservation Div. Rules and Regs., Rule 701 (1968); Corporation Commission of Oklahoma Rules and Regs., 2-240, 2-250, 2-261 (1973). The material before the Court shows no state in which production from secondary recovery projects is treated in a manner identical to production from primary recovery projects. The systems of allowables shown in the records before this Court show that the state regulators all recognize the role played by enhanced recovery techniques and the necessary role of injection wells in the production of crude oil. The state regulators recognize that the goals of the proration system—to prevent waste and to ensure maximum recovery of oil from a reservoir—can be achieved by providing for the role of injection wells when setting allowables.

Historically, federal agencies have recognized the identity of contribution to the oil production process made by recovery wells and injection wells on secondary recovery projects.

In 1944, the director of the Office of Economic Stabilization granted "stripper wells" an increase in price. The plan was

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[3] Notably, an allowable will not be given a salt water disposal well, unless that well is an injection well. Rule 47, Texas R.R. Comm.

designed to "keep stripper wells in operation, to encourage reopening and cleaning out of old wells, and to make secondary recovery projects feasible." 9 Fed.Reg.7769. "Pools" which were averaging less than nine barrels of oil per well per day were allowed to increase prices. The regulations required calculation of:

> "Daily Average per well production of pool during month of December 1943 in terms of 42-gallon barrels. (The number of wells to be considered the number of wells producing as of December 31, 1943.)" (Id.)

Although is it unclear whether this definition was subject to one standard interpretation or not, the only evidence this Court has as to the application of this provision to injection wells is the undisputed testimony that in Texas injection wells were included in determining qualification for the increased prices under that federal regulation. (Baumel, T.668, 671.)

Section 263 of the Internal Revenue Code allows operators an option either to deduct or capitalize intangible drilling and development costs "in the case of oil and gas wells." This provision has been implemented to include all intangible expenditures "incident to and necessary for the drilling of wells and preparation of wells for the production of oil and gas." Treas.Reg.Sec. 1.612-4(a). The I.R.S. recognizes that the costs incurred in drilling an injection well should be treated in the same manner as those costs incurred in drilling a recovery well, and are chargeable to capital or deductible as expenses. Rev.Rul. 69-583, 1969-2 C.B. 41. The I.R.S. thus has held that injection wells are within the term "oil wells" as used in Section 263 of the Internal Revenue Code.

The Mineral Land Leasing Act of 1920, Pub.L.No.146, Ch. 85, 41 Stat. 437, authorized the execution of oil and gas leases by the Secretary of the Interior on federal lands at royalties to be determined by the Secretary on the basis of competitive bidding. The Act itself provided a stripper well exemption from these standard royalty provisions:

> "Whenever the average daily production of any oil well shall not exceed ten barrels per day, the Secretary of the

> Interior is authorized to reduce the royalty on future production when in his judgment the wells can not be successfully operated upon the royalty fixed in the lease."

The apparent purpose of this exemption was to allow marginal wells preferential treatment to prevent abandonment and to insure maximum production.

In 1935, as a part of a general revision of this act, the exemption was rewritten to provide:

> "Whenever the average daily production of the oil wells on an entire lease or on any tract or portion thereof segregated for royalty purposes shall not exceed ten barrels per well per day, or where the cost of production of oil or gas is such as to render further production economically impracticable the Secretary of the Interior, *for the purpose of encouraging the greatest ultimate recovery of oil and in the interest of conservation of natural resources*, is authorized to reduce the royalty on future production when in his judgment the wells cannot be successfully operated upon the royalty fixed in the lease." (Emphasis added.).

Ch. 599, Sec. 1, 49 Stat. 676 (Aug. 8, 1935). In 1936, the statutory measure was implemented through a provision which provided that only wells which yielded commercial volumes of production during part of a month were to be considered in ascertaining the well count for determining average daily production. Injection wells were to be counted. 56 I.D. 415, 427 (1936). This holding has remained unchanged and is currently embodied in Section 221.49 of 30 C.F.R.:

> "Sliding and step-scale royalties are based on the average daily production per well. The supervisor shall specify which wells on a leasehold are commercially productive . . . but only wells which yield a commercial volume of production during at least part of the month shall be considered in ascertaining the average daily production per well.
>
> . . . . .
>
> "(b) Wells approved by the supervisor as input wells shall be counted as producing wells for the entire month if so

used 15 days or more during the month, and disregarded if so used less than 15 days during the month."

Although the statutory stripper well exemption from the royalty rates was subsumed into a general provision granting the Secretary of the Interior power to modify royalty rates, the exemption continues in the administrative practices of the Department of Interior.

The testimony of John Duletsky provided the Court with great insight into the manner in which this provision was actually applied by the Department of Interior (DOI). Mr. Duletsky had been a long time employee of the DOI and had served as a senior official in a position within the DOI which dealt with the application of this regulation. The Court believes that there could be no individual more knowledgeable about the treatment of injection wells for purposes of the step or sliding scale royalty than Mr. Duletsky. He testified that to be counted as a well for purposes of determining average daily production, an injection well had to meet two conditions. First, the injection well had to be completed in the correct oil bearing formation. Second, the well must have been injecting water into the oil bearing formation for at least fifteen days a month. (Duletsky, T.577-78.) He dispelled any doubt that the term "input well" used in the regulation, is synonymous with the term "injection well." (Duletsky, T.575-76.) This testimony is buttressed by plaintiffs' Exhibit 45, which is a chapter from the DOI Conservation District Manual, containing rules and procedures relating to the variable regulatory rate and well count. See, P.X. 45, pp. 6-7.

Duletsky stated it was his belief that the inclusion of injection wells was brought about by the Government's concern "in the public interest to maximize the ultimate recovery from a reservoir, prevention of waste, and conservation." (T.579.)

Duletsky's testimony shows that the DOI treats injection wells in a manner similar to recovery wells for purposes of determining well count. An active injection well is routinely counted as a well for determining average daily production per

well. A shut-in injection well is usually treated as a shut-in recovery well and excluded from the well count. Beyond all question, DOI regulation 221.49(b) is not a narrow, limited exception niggardly administered by a secretary who exercises discretion to exclude injection wells. This section establishes the general proposition that active injection wells are productive wells and are to be included in the well count for purposes of the variable royalty.[4]

II. STATUTORY BACKGROUND

In the early 1970's, acting pursuant to the Economic Stabilization Act of 1970, 12 U.S.C.A. Sec. 1904 (note), the Cost of Living Council (CLC) promulgated a comprehensive series of regulations governing the maximum prices at which domestic crude oil and refined petroleum products could be sold. In general, the regulations established a "two tier" price system for production from each "property," and set a ceiling on the prices charged for the first sale of domestic crude oil. This system was designed to halt the inflationary spiral of crude oil prices while limiting the disincentive effect of oil price regulations. 6 C.F.R. Sec. 150.354.

The statutory stripper well exemption originated as an amendment to S. 1081 (TAPAA) offered by Senator Bartlett, United States Senator from Oklahoma, a principal oil-producing state, on the Senate floor. This original amendment read:

> "Those oil leases whose daily average production per well does not exceed that of a stripper well of not more than ten

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[4] Other types of wells are not allowed to be counted. Abandoned, disposal, water source, observation wells, are not permitted to be counted. Under certain circumstances, shut in wells are allowed to be counted only if approved by the Supervisor. P.X. 45, p. 6.

> barrels of oil per day shall be exempt from any allocation or price restraints established by any act of law."

This amendment was adopted by the Senate and subsequently amended by Senator Jackson to read:

> "The first sale of crude oil and natural gas liquids produced from any lease whose average daily production of such substances does not exceed ten barrels per well shall not be subject to price restraints established pursuant to the Economic Stabilization Act of 1970 as amended, or to any allocation program for fuels or petroleum established pursuant to that Act or to any Federal law for the allocation of fuels or petroleum."

Senator Jackson also amended the amendment to provide that the agency designated to administer the allocation program be allowed to promulgate regulations implementing the exemption.

The exemption as amended was enacted as Section 406 of the Trans-Alaska Pipeline Authorization Act, Pub.L.93-153, 87 Stat. 590 (codified at 12 U.S.C. § 1904).[5] The Conference Committee added a provision requiring leases to be operated at the

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[5] "Sec. 406(a) The first sale of crude oil and natural gas liquids produced from any lease whose average daily production of such substances for the preceding calendar month does not exceed ten barrels per well shall not be subject to price restraints established pursuant to the Economic Stabilization Act of 1970, as amended, or to any allocation program for fuels or petroleum established pursuant to that Act or to any Federal law for the allocation of fuels or petroleum.

(b) To qualify for the exemption under this section, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

(c) The agency designated by the President or by law to implement any such fuels or petroleum allocation program is authorized to conduct inspections to insure compliance with this section and shall promulgate and cause to be published regulations implementing the provisions of this section."

maximum feasible rate. Regulations implementing this exemption were published by the Cost of Living Council (CLC) at 38 Fed.Reg. 32494 (November 26, 1973) (6 C.F.R. Sec. 150.54(s)). These regulations defined the terms "average daily production" as follows:

> "Average daily production" means the qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar month, divided by a number equal to the number of days in that month times the number of wells which produced crude petroleum and petroleum condensates, including natural gas liquids, from that property in that month. To qualify as maximum total production, each well on the property must have been maintained at the maximum feasible rate of production, in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production."

On November 27, 1973, the President signed into law the Emergency Petroleum Allocation Act of 1973 (EPAA), Pub.L. No. 93-159, 87 Stat. 628 (codified at 15 U.S.C. Sec. 751). Section 4(a) of the EPAA required the President promulgate regulations providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts and at prices specified in regulations.

Subparagraph 4(e)(2)(A) of the EPAA also contained a stripper exemption.[6] Regulations implementing this provision were

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[6] "(2)(A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

(B) To qualify for the exemption under this paragraph, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

(C) Any agency designated by the President under section 5(b) for such purpose is authorized to conduct inspections to insure com-

published as a revised version of 6 C.F.R. Sec. 150.54(s), 38 Fed.Reg. 34464 (December 14, 1973). These regulations were identical to the earlier regulations in all respects important to this case.

On December 4, 1973, the President issued Executive Order No. 11748, establishing the Federal Energy Office (FEO) and delegating to the FEO primary responsibility for administering and enforcing the petroleum allocation and pricing provisions of the EPAA. 38 Fed.Reg. 33575 (December 6, 1973). The FEO thereafter adopted Mandatory Petroleum Price Regulations which incorporated the petroleum pricing regulations that had originally been promulgated by the CLC. The CLC's stripper well lease exemption was ultimately incorporated in these regulations, when on January 14, 1974, FEO adopted and reissued the CLC definitions of "stripper well lease" and "average daily production." 10 C.F.R. § 210.32(b), being identical to 6 C.F.R. § 150.54(s).

On May 7, 1974, the President signed into law an act of Congress known as the Federal Energy Administration Act of 1974 (FEAA), 15 U.S.C. Sec. 761 et seq., Pub.L.No.93-275, 88 Stat. 96. The FEAA established the Federal Energy Administration (FEA) and authorized the President to delegate to the FEA authority vested in the President by law.

On June 25, 1974, the President issued Executive Order No. 11790. 39 Fed.Reg. 23185 (June 27, 1974). That Executive Order, in addition to giving notice that the FEAA was to become effective as of June 27, 1974, abolished the FEO, revoked Executive Order No. 11748, and delegated to the FEA all authority vested in the President by the EPAA. The duty of administering and enforcing the petroleum allocation and pricing provisions of the EPAA was thereby assigned to

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pliance with this paragraph and shall promulgate and cause to be published regulations implementing the provisions of this paragraph."

the FEA, and the implementing regulations became the responsibility of the FEA.

On December 19, 1974, the FEA issued Ruling 1974-29, 39 Fed.Reg. 44414 (December 24, 1974). That Ruling held that injection wells were not to be counted as wells for purposes of determining whether the average daily production per well from a property exceeded ten barrels in the preceding calendar year.

The relevant portions of the Ruling read as follows:

> "*ISSUE:* Is an 'injection well' a "well" for the purpose of determining whether the average daily production of a property was 10 barrels or less per well in the preceding calendar year, for purposes of the stripper well lease exemption of 10 C.F.R. § 210.32?
>
> "*RULING:* No. Under the FEA regulations, the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease is exempt from the mandatory price and allocation regulations. A stripper well lease is defined as a property whose average daily production did not exceed 10 barrels per day per well during the preceding calendar year. 'Average daily production' is further defined in 10 C.F.R. § 210.32(b) as:
>
> > 'The qualified maximum total production of domestic crude petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of wells which produced crude petroleum and petroleum condensates, including natural gas liquids from that property in that year.'
>
> "Thus, the FEA regulations by their specific language provide that only wells 'which produce crude petroleum' are to be counted in calculating average daily production for the purpose of determining whether the stripper well lease exemption applies. While injection techniques help to 'produce' crude petroleum, they are not wells which themselves 'produce' crude petroleum. Therefore, wells which did not actually yield or produce crude petroleum during the preceding calendar year are not production

wells for this purpose. Whether the non-producing well was an 'injection' well, a disposal well, a dry well, a spent well or a shut-in well will not change this result."

III. THE DOE'S EXCLUSION OF INJECTION WELLS CONFLICTS WITH CONGRESSIONAL INTENT

As stated in this Court's order of June 11, 1980, the Court believes that TECA has held that the regulation defining average daily production itself mandated the exclusion of injection wells from the well count. The focus of this decision, therefore, is upon the underlying regulation and not upon the ruling.

The legal foundation and proper procedure for this Court to follow in reviewing the regulation at issue in this case was stated by the Supreme Court in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). Three distinct inquiries are required. First, this Court must determine whether the actions of the agency were within the agency's authority. Second, the Court must decide whether the action by the agency was "arbitrary, capricious or an abuse of discretion, or otherwise not in accordance with law." Finally, this Court must decide whether the agency's actions followed the necessary procedural requirements.

In the prior proceedings in this case the third inquiry has been satisfied. Both the regulation and ruling at issue have been determined to be procedurally valid. The Court need now only consider the first two issues.

The defendant contends that the agency's interpretation of the statute to exclude injection wells from the well count must control this Court. Much of the problem with this position, as will be more fully noted, is that the only real clue of how the agency viewed the statute is the result it reached in holding that injection wells cannot be counted.

The Court is acutely aware that an agency's interpretation of a statute which the agency is authorized to administer is entitled to "substantial deference." *Quern* v. *Mandley*, 436 U.S. 725, 736, 98 S.Ct. 2068, 2076, 56 L.Ed.2d 658 (1978). This

deference, however, does not render an agency's interpretation exempt from judicial scrutiny. The deference due any interpretation "is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history." *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 99 S.Ct. 790, 800, 58 L.Ed.2d 308 (1979).

> "The weight to be given to an administrative interpretation depends upon 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control.' "

Standard Oil Co. v. *D.O.E.*, 596 F.2d 1029, 1056 (Em.App.1978), quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124, 129 (1944). The Court has an obligation to examine anew the legislative history and purpose of the statute.[7]

The interpretation given the statute did not evolve as a result of a comprehensive evidentiary hearing, as is done in many instances. Nor does the interpretation given the statute appear to have been the product of the expertise of the agency. Rather, the interpretation seems to have been the product of the agency's reading of congressional intent, principally from language of the Act alone. Divining congressional intent behind a statute is a task to which courts are at least equally suited as are administrative agencies. This fact mitigates against according the interpretation extra authoritative weight.

In *Barlow* v. *Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 837, 25 L.Ed.2d 192 (1970), the Supreme Court was faced with a challenge to a regulation promulgated by the Secretary of

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[7] The Court believes that this obligation is even greater in the present case where the Court has found the interpretation to have been arrived at in an arbitrary and capricious manner. See part IV, infra.

Agriculture which defined "making a crop." The Court held that defining that term was not a discretionary judgment of the Executive Branch:

> "On the contrary, since the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction. See *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 268-70, 80 S.Ct. 1122, 1126-1127, 4 L.Ed.2d 1208. 'The role of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise. "Where the only or principal dispute relates to the meaning of the statutory term . . ." (the controversy) presents issues on which courts, and not (administrators) are relatively more expert.' *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 14, 88 S.Ct. 651, 658-659, 19 L.Ed.2d 787 (Harlan, J. dissenting)."

See also, *Wilderness Society* v. *Morton*, 479 F.2d 842, 866 (D.C.Cir.1973), *cert. denied*, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (1973); *UPG, Inc.* v. *Edwards*, 647 F.2d 147, at 156 n.23 (Em.App.1981).

The defendant argues that other factors are also important in determining whether the agency interpretation should be given extra authoritative weight. Three questions are generally considered when looking at an agency interpretation. Was the interpretation contemporaneous with the enactment of the statute? Has the interpretation consistently been followed over a long period of time? Was the interpretation outstanding at the time of a reenactment of the statute? *Energy Consumers and Producers Association, Inc.* v. *D.O.E.*, 632 F.2d 129, 143 (Em.App.1980).

It is true that, in this case, the regulation was issued contemporaneously with the statute. It is equally true, however, that the regulation was not drafted with the intent either to exclude or to include injection wells from the well count. There raged within the agency a great debate as to whether injection

wells were within the statutory exemption. The documentary material before the Court shows that the proper interpretation to be given the regulation and statute was debated until the time that Ruling 1974-29 was promulgated. See, e.g., P.X. 72, 73, 75, 85, 92, 131, 132, 136, 137, 139, 140. See also, G.X. Z-1. All individuals involved in the agency action with respect to injection wells who came before this Court agreed that the inclusion of injection wells in the stripper well exemption was an unresolved issue until the time of the Ruling.

Linda Buck, in May, 1974, prepared a memorandum, the purpose of which "was to devise a method of proposing a clarification to what we believed to be an ambiguous regulation." (Buck D. 41.) George Biondi recognized in July of 1974, that the issue was unresolved. (Biondi, D.36-7.) See also, Walker, D. 59, 64, Ware T. 957, 1005-16, 1009-10. Phillip Essley recognized that the regulation did not conclusively decide the issue, and that the issue was not finally determined until the release of Ruling 1974-29 in December, 1974, more than one year after the passage of the stripper well exemption. (Essley, T. 1208-15.)

Since the construction ultimately arrived at by the agency was not one made "soon after the time of enactment," it does not qualify as a contemporaneous construction. *Russ* v. *Wilkins*, 624 F.2d 914, 923 (9th Cir. 1980). The evidence before the Court shows that there was no single contemporaneous construction of the statute or regulation to exclude injection wells from the well count. This factor does not indicate that extra authoritative weight need be given the agency interpretation.

Nor does the evidence show that there was one consistent and uniform application of the statute and regulation to exclude injection wells. The record before the Court contains examples of times at which oil producers were advised to count injection wells.

On December 6, 1973, Robert Weldon, who was then Engineering Supervisor of Joint Operations for Clinton Oil Company (now Energy Reserves Group, Inc.), contacted the

CLC to determine whether injection wells could be included in the well count. Mr. Weldon was referred to Andrew Drance, of the CLC, who advised him that injection wells were to be included in the well count. (Weldon, D. 21-4.) Mr. Drance's position within the agency was close to that of the regulation's draftors.

On December 7, 1973, Ernest T. Pelikan, who was then in the Management Services Department of Arthur Young & Company, contacted the CLC on behalf of Suburban Propane Gas Corporation, another of the plaintiffs. Mr. Pelikan also had a telephone conversation with Andrew Drance and was advised that injection wells could be included in the well count. (Pelikan, D.27-8.)

In January, 1974, August Erickson, then Vice-President of Sklar & Phillips, contacted Eugene Waters of the Internal Revenue Service, the agency delegated responsibility at that time for enforcing the petroleum pricing regulations. On January 30, 1974, Waters and W. M. Meriwether, of the I.R.S., telephoned Erickson and advised him that injection wells could be included in the well count. (Erickson, D. 28-31.) The oral advice that injection wells could be counted was confirmed by a letter from Waters on January 31, 1974 (P.X. 54).

In late 1973, James H. Roark and Carl E. Stone, of King Resources Company (now Phoenix Resources Company) were advised by I.R.S. officials in Oklahoma City that injection wells could be included in the well count. (Roark, D.12-3, 46).

In October, 1974, Larry White, Dallas Area Manager of the F.E.O.'s Region VI Office, advised a New Mexico producer that injection wells could be included in the well count in calculating average daily production under the stripper well exemption regulation. (White, D.26, 39, 71-7.) White based this advice on the regulations and on Form P-1 of the Texas Railroad Commission, Oil & Gas Division, which included injection wells as producing wells. (White, D.85-7, 99, 101.) White's advice was founded in part on a mid-May, 1974, letter from the Regional Counsel of Region VI, advising a Dallas-

based company that injection wells were to be included in the well count, a copy of which he had seen. (White, D.26-8, 32, 75-6.) White established a training program for the agency's auditors in Region VI. (White, D. 82-7.) This program, adopted by the national office, instructed auditors that the stripper well exemption permitted producers to include injection wells in the well count. (White, D.82-7.)

On October 2, 1974, M. H. McConnell, of Phillips Petroleum Company, traveled to Washington, D.C., to obtain guidance from agency officials concerning the injection well issue. McConnell was referred to and met with Roy Whitson, Rendel Alldredge, and a Mr. Kourkoumelis of the F.E.A. After a lengthy conference, McConnell was advised that injection wells should be counted. (McConnell, D.304.)

In August and September, 1974, Audie Moore, of Kewanee Oil Company, also visited Washington, D.C., to obtain guidance as to the meaning of the agency's stripper regulation. He initially met with Rendel Alldredge and Bob Kahl, of the F.E.A. (Moore, D.29.) At that meeting, Alldredge and Kahl expressed the view that injection wells could be included in the well count. (Moore, D.30-1.) In order to obtain additional confirmation, however, Moore met on September 4, 1974, with four other officials of the Compliance Division of F.E.A. At the conclusion of that meeting Moore was advised that injection wells could be included in the well count. (Moore, D.37-8.)

The defendant's argument that only official interpretations should be examined is patently incorrect, and has been rejected by the Court on at least one prior occasion. See Order filed June 11, 1980. TECA, in *Standard Oil Co.* v. *Department of Energy*, 596 F.2d 1029, 1056 (Em.App.1978), held that statements of lower level officials should not be disregarded:

> "The FEA contends that only the FEA's General Counsel, his staff, and other 'high level policy makers' had the authority to issue official interpretations of its regulations. Consequently, it argues, in determining what the agency's interpretation was this court should ignore the actions of the FEA auditors and other lower level officials

during the relevant period. This court held in *California Molasses Co.* v. *California & Hawaiian Sugar Co.*, 551 F.2d 1230, 1233, 1239 (Em.App.1977), that the interpretation of agents of the IRS, which had been charged with enforcing price controls, were entitled to deference by the courts. We recognize, as the FEA argues, that California Molasses is not precisely in point. We do conclude, however, that the statements by the FEA auditors and other lower level officials are entitled to weight in determining the thoroughness of the FEA's consideration of its regulations, the validity of its reasoning, and its consistency with earlier and later pronouncements."

This Court considered the evidence of the interpretation given by lower level officials only as it impacted on the consistency and contemporaneous construction issues.

The defendant contends that the *Standard Oil* rule is applicable only where the only announced public position is contrary to the formal interpretation eventually adopted by the agency. 596 F.2d at 1056. The defendant does not explain why the broad statement cited above should be so limited. If this Court were to accept this argument, the "consistency" inquiry would be relevant only where the agency's final position is contrary to all advice theretofore given. This Court can see no reason that the consistency inquiry would not be equally applicable in this case where not all the advice expressed was contrary to the final position. The concerns raised by the defendant more nearly reflect on the extent of consistency or inconsistency rather than whether it is properly an issue for this Court.

The record before the Court does disclose that perhaps the bulk of the advice given by the agency was to the effect that injection wells should not be counted. The reason that this advice was given does not seem to be that the interpretation was uniformly accepted as the "true" interpretation of the regulation or statute—rather, the interpretation was the most favorable to the agency, and represented the most conservative advice. Linda Buck identified the reasons that this advice was given:

"Q. Okay. Now, let's talk a little bit about the advice you—what the advice you gave to crude oil produc-

ers was characterized. As I understand what your testimony has been thus far, the advice you gave to crude oil purchasers when an inquiry was made about the injection well issue was basically in four parts: one, that the regulation was unclear and ambiguous; two, that the issue was unresolved in the agency; three, that the agency was working on the issue; and four, because the issue remained unresolved, that if the producer included injection wells in the well count they did so at their own risk.

A. I hope I said it that well; but, yes, that is the essence." (Buck, D.74-5.)

The Court concludes that the current interpretation is not one which has been followed consistently over a long period of time, such as would justify special deference.

The third inquiry the Court must make in determining whether the interpretation is entitled to special deference is whether the interpretation was outstanding at the time of a reenactment of the statute. The stripper well exemption was reenacted in § 121 of the Energy Conservation and Production Act of 1976, P.L. 94-385, 90 Stat. 1125 (1976). At that time there was no attempt to change the interpretation. This fact is a reason for deference to the existing interpretation. See, *Energy Consumers and Producers Association, Inc.* v. *D.O.E.*, 632 F.2d 129, 144 (Em.App.1980). The weight to be accorded this fact, however, is greatly lessened by the fact that there was actual disagreement with the interpretation by Congress *following* the reenactment.

In 1977, Senator Bartlett proposed that the stripper well provision be amended to add:

> "Included in the count of the total number of wells on a property shall be all wells producing crude oil and all wells unitized for the purpose of injecting water and/or other materials into a producing reservoir for the purpose of enhancing oil recovery."

123 Cong.Rec.S. 18212 (Oct. 31, 1977). Senator Jackson, a senator from the non-oil producing state of Washington, opposed this amendment:

> "The proponents are urging here, in effect, that it clarifies the intent of the so-called stripper well amendment. Mr. President, I supported the original exemption from price controls for the so-called stripper wells.
>
> "I point out that the language of the existing law expressly refers to wells producing crude oil. It does not include injection wells, nor was it intended to. The effect of the amendment would be to expand the number of crude oil producing properties which are exempt from price controls."

123 Cong.Rec.S. 19213. Senator Bellmon, of Oklahoma, purportedly familiar with oil industry practices, on the other hand, supported the amendment:

> "Mr. President, very briefly, I would simply like to say I consider it to be senseless not to permit the counting of injection wells when determining average daily production. If these are not oil wells in the strict sense of the word, they are certainly essential to oil production. I felt, when we passed the stripped [sic] well amendment initially, they would be included. The Interior Department has long counted injection wells. I am not sure Members of the Senate realize this, but the Interior Department has long counted injection wells in the administration of the Federal mineral leasing program. This is not anything new we are trying to do. It has been the custom already in the Interior Department and has been for some time.
>
> "When we originally enacted the stripper exemption, and when we reenacted it in 1976, I certainly believed that the FEA (now the Department of Energy) would follow the very sensible precedent set by the Interior Department."

123 Cong.Rec.S. 18215. The Senate disagreed with Senator Jackson. The proposed amendment passed the Senate, but no similar provision was contained in the House bill, and the Conference Committee failed to adopt the proposed amendment. Conference Committee on Energy Tax Act, House

Conf.Rep.No.95-1773, 95th Cong. 2d Sess. 57 (Oct. 11, 1978) [1978] U.S. Code, Cong. & Admin.News 8087.

The Court believes that the simple fact that Congress was debating its original intent in enacting the stripper well exemption long after reenactment critically weakens the claim that reenactment constituted ratification. This Court, therefore, believes that this factor does not require additional weight be accorded the interpretation.

The Court believes that none of these factors require the Court to grant the agency's interpretation deference to the extent that the Court must be bound by that holding. This Court must exercise its obligation to review the statute and legislative history to determine whether the agency's position can be sustained, or whether the meaning, purpose and history of the statute requires a contrary construction.

The starting point for any consideration of the meaning of a legislative enactment is the language of that act. The statutory stripper well exemption refers to "crude oil . . . from any lease whose average daily production of such substances . . . does not exceed ten barrels per well. . . ." In the context of this statute, the word "well" is unrestricted. Unless some indication to the contrary is present, the Court must conclude that the term "well" is intended to be given its ordinary meaning. No one has seriously contended that an injection well is not within the generic term "well." The Court believes that simple reliance upon the statutory language is a dangerous approach to determining the meaning of the statute. As stated in *New York State Commission on Cable Television* v. *F.C.C.*, 571 F.2d 95, 98 (2 Cir. 1978), *cert. denied*, 439 U.S. 820, 99 S.Ct. 85, 58 L.Ed.2d 112:

> "Mere incantation of the plain meaning rule, without placing the language to be construed in its proper framework, cannot substitute for a meaningful analysis. For we must remember Judge Learned Hand's stricture that '[t]here is no surer way to misread any document than to read it literally . . .' *Guiseppi* v. *Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (concurring), *aff'd sub nom. Gemsco*,

Inc. v. *Walling*, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945). And as Professor Cox wisely noted, '[n]o one has ever suggested that the courts must always follow the letter of a statute regardless of the outcome, nor does any one contend that the words may be entirely disregarded. The issue is where to strike the balance.' Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv.L.Rev. 370, 376 (1947). The appropriate methodology, then, is to look to the 'common sense' of the statute or regulation, to its purpose, to the practical consequences of the suggested interpretations, and to the agency's own interpretation for what light each inquiry might shed. See *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 849, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975); *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543-44, 60 S.Ct. [1059] [1063-1064] 1069, 84 L.Ed. 1345 (1940)."

The legislative history behind the stripper well exemption can best be described as sketchy.

The Conference report to the TAPAA exemption contains some indication of the intent of Congress in passing this exemption:

> "The purpose of exempting small stripper wells—wells whose average daily production does not exceed ten barrels per well—from the price restraints of the Economic Stabilization Act (now Phase IV) and from any system of mandatory fuel allocation is to insure that direct or indirect price ceilings do not have the effect of resulting in any loss of domestic crude oil production from the premature shutdown of stripper wells for economic reasons."

[1973] U.S. Code, Cong. and Admin. News, 2417, 2523, 2531. The Conference report noted that this exemption:

> "[w]ill encourage owners and operators of stripper wells to maintain production and to keep these wells in operation for longer periods of time than would be possible if the value of their crude oil production were determined under Phase IV price ceilings. This increased incentive will, it is anticipated, permit stripper well operators to make new

> investments in the eligible wells and improve the gathering and other facilities for moving this oil to market."

Id. at 2532. Senator Bartlett, also an Oklahoma senator and the drafter of this exemption, noted the benefits of the exemption when he proposed the measure:

> "There are three reasons that adoption of this amendment will help to maintain current oil production:
>
> First. The ability for the operator of a stripper well to seek higher prices for his crude oil would help to offset the high costs of the equipment necessary to lift the crude oil from the reservoir after the natural pressure mechanism of the producing formation has been depleted. For example, a pumping well could be operated longer because of the more favorable economics.
>
> Second. There would be an incentive to do remedial work on the well. Most remedial work requires a large investment for the operator. Whether or not he makes this investment depends upon the likelihood of recovering his investment with a reasonable profit.
>
> The third reason is that secondary oil recovery projects would be encouraged. Projects that up to now have been uneconomical to initiate and that have remained in producers' file cabinets would now move forward to help flush more oil out of the stingy oil reservoir."

119 Cong.Rec. 23874 (July 14, 1973). Sponsors of the measure repeatedly pointed out that this measure would allow wells to provide oil that otherwise would have to be purchased from foreign countries. See, *Remarks of Sen. Hansen*, 119 Cong. Rec. 23875-76; *Remarks of Sen. Cook*, 119 Cong.Rec. 23876; *Remarks of Sen. Bartlett*, Id. Senator Fannin pointed out that the proposed amendment was "really a conservation measure and provides an incentive not to leave oil in the ground." 119 Cong.Rec. at 23877.

The subject of secondary recovery was also mentioned by the senators. Senator Cook suggested that:

> "by far the biggest percentage of production from stripper wells, 10 barrels or less, is secondary or tertiary recovery. The lives of those wells have passed, and they are in the

process of bleeding that well or pumping to the best of their ability to get what is left. However, once they stop that, that source is gone."

Senator Bartlett also mentioned secondary recovery:

"I merely want to say that most of the stripper production that a major would have—and it would be very little—would be production that the major is hoping to waterflood or use a secondary recovery program, which is a tremendous operation and is a very high cost operation, even though they may later produce a lot more oil."

"This is a conservation program and I think it is needed, regardless of who is providing the money and the leadership." 119 Cong.Rec. at 23878.

These statements and the entirety of the legislative history show the underlying purpose of the statute. The stripper well exemption was designed to encourage the operation of marginally productive wells to produce oil that otherwise would not be produced. Congress clearly believed that it was better to allow owners of leases with marginally economic wells to increase price to the level of foreign oil prices than to have the oil left permanently in the oil reservoir. Congress made the policy determination that that point was reached when the per well production of a lease reached ten barrels per day.

Congress, however, recognized that granting this exemption created an opportunity for abuse.

"The Congress intends that the provisions of this section will be strictly enforced and regulated by the administering agency to insure that the limited exemption of this class of wells for the express purposes described above is not in any way broadened. To achieve this, Congress authorizes on-site inspections to insure compliance. Congress also directs that the administering agency shall promulgate regulations to implement the provisions of this section before it becomes operative. The Conferees expect the administering agency *to utilize State data regarding production volumes*, and to provide by regulation safeguards against the manipulation or gerrymander-

ing *of lease units* in a manner that evades the price control and allocation programs.

"These regulations shall be so designed as to provide safeguards against any abuse, over-reaching or altering of *normal patterns of operations* to achieve a benefit under this section which would not otherwise be available. Congress specifically intends that the regulations shall, among other things, prevent any 'gerrymandering' *of leases* to average down high production wells with a number of low production stripper wells to remove the high production wells from price ceilings. The *sole purpose and objective* of this Section 406 is to keep stripper wells—those producing less than ten barrels per day—in production and to insure that the crude oil they produce continues to be available for U.S. refineries and U.S. consumers. It is not intended to confer any benefit on the owners and operators of wells producing in excess of ten barrels per day." (Emphasis supplied.)
U.S. Code, Cong. and Admin. News, 2532-53.

The plaintiffs argue that the legislative references to secondary recovery clearly show an intent to include injection wells in the well count. The Court has carefully reviewed all the legislative history and is unable to conclude with any degree of certainty that the congressmen who considered this amendment indicated their intent to include or exclude the counting of injection wells. Clearly, the amendment was intended to be applicable to and to encourage oil recovery utilizing normal secondary recovery methods. While this amendment alone, does not conclusively establish an intent to require the counting of injection wells, it does reference state data and production practices as well as normal patterns of operations in the oil industry.

The defendant's counsel in this case argues that the legislative history conclusively demonstrates that Congress intended only recovery wells be included in the well count. In support of this argument the defendant cites numerous references by legislators debating this measure to "stripper wells producing . . ." or "stripper wells that produce . . ." or "production from such wells. . . ." See defendant's post trial brief at 13. Several observations can be made about this theory. First, this in

terpretation is potentially in conflict with the wording of the statute, which focused not on wells which produced, but rather which looked to leases which produced. Were this Court to accept the defendant's theory, the exemption would clearly be constricted beyond the meaning of its plain words.

Second, this argument can only begin to be persuasive if the only possible intended meaning of the senators who used the word "produce" was "emit from the wellhead." The Court finds it impossible to conclude that such a narrow meaning was intended by these senators. It is equally plausible that these senators were using the word "produce" in the same sense that eminent experts used that word when they described how injection wells "produce" oil. See pp. 1244-1246, supra, or as the DOI used the word when talking of "commercially productive" wells.

The defendant attempted to bolster this theory by parading before the Court a large number of forms utilized in the oil industry to record production data. The defendant contended that these documents somehow established that "produce" has the limited meaning defendant ascribes to it. This Court declines the defendant's invitation to elevate forms over substance. The fact that some of these forms utilize the term "production well" to describe recovery wells does not mean that only these wells "produce" crude oil. In fact, many of these forms utilize the word "produce" in the more general sense suggested by the plaintiffs. (Burt, T.1045.) The Court concludes that the Congressmen did not intend to prohibit the counting of injection wells when they made references to wells which "produce" crude oil. "Produce," when used by these Congressmen, was not intended to act as a narrow term of art to denote only recovery wells.

The Court noted that it does not appear that these remarks by senators were relied upon in the original formulation of the regulation. Indeed, even the Ruling does not rely upon these remarks in holding that injection wells cannot be counted. The Court believes that this theory of Congressional intent is a post

hoc rationalization of the attorneys representing the Department, rather than the determination of an agency official. The Supreme Court, in *Investment Company* v. *Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971), cautioned against relying upon such theories. That case dealt with the interpretation to be given provisions in a banking statute at pp. 628 and 1097 of the respective cited case reporters, viz:

> "The difficulty here is that the Comptroller adopted no expressly articulated position at the administrative level as to the meaning and impact of the provisions of §§ 16 and 21 as they affect bank investment funds. The Comptroller promulgated Regulation 9 without opinion or accompanying statement. His subsequent report to Congress did not advert to the prohibitions of the Glass-Steagall Act. . . . To be sure, counsel for the Comptroller in the course of this litigation and specifically in his briefs and oral argument in this Court, has rationalized the basis of Regulation 9 with great professional competence. But this is hardly tantamount to an administrative interpretation of §§ 16 and 21. In *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 83 S.Ct. 239, 9 L.Ed.2d 207, we said, 'The courts may not accept appellate counsel's post hoc rationalizations for agency action. . . . For the courts to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review.' Id., at 168-169, 83 S.Ct. at 246. Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress. Quite obviously the Comptroller should not grant new authority to national banks until he is satisfied that the exercise of this authority will not violate the intent of the banking laws. If he faces such questions only after he has acted, there is substantial danger that the momentum generated by initial approval may seriously impair the enforcement of the banking laws that Congress enacted."

Defendant's counsel also argues that the exemption was only designed to reach wells which were traditionally considered

"stripper wells." This argument does appear to be something more than post hoc rationalization by department attorneys, as there is some evidence that this belief was present within the agency. It does not appear, however, that this consideration played any part in the decision concerning the regulation. This belief cannot be found in Ruling 1974-29 or in any materials which were circulated within the agency concerning the issue of whether to include or exclude injection wells. Ruling 1974-28, however, contains some reference to the belief that the stripper well exemption was to be construed only to include wells traditionally labelled "stripper wells." That Ruling stated in part:

> "This interpretation of a stripper well lease comports with industry usage and the congressional intent in providing for a stripper well lease exemption in the Emergency Petroleum Allocation Act of 1973. The phrase 'stripper well' has long been understood in the petroleum industry to refer only to a well which produces oil, or oil with associated gas. The 'stripper well' concept, commonly measured at ten barrels per day, has never extended to gas wells, whose production of liquids is always marginal by definition."

39 Fed.Reg. 4414 (Dec. 24, 1974). Senator Bartlett, the senator who proposed the amendment recognized the traditional definition of a stripper well: "By definition a stripper well averages 10 barrels of oil per day or less." 119 Cong.Rec. 23873 (July 14, 1973). Reliance on the traditional definition of stripper wells, however, potentially leads to results contrary to the language of the statute. The language of the statute focused on leases, not on individual wells. The scope of the exemption was not drawn to be coextensive with the traditional scope of the term "stripper well." Since the exemption focused on a lease, a given recovery well could emit 100 barrels a day, and if the per well average on the lease was 10 barrels a day or less the well would qualify as a stripper well.

In the post-trial brief the defendant argues:

> "There is absolutely no indication, however, that Congress, in drafting this statute, was focusing on anything

other than low production wells in the primary production phase. There is not a whisper in the statute or Conference Report on injection wells or secondary recovery operations.

"When the statute was written, in 1973, less than half of all stripper well production came from properties with secondary recovery projects. Essley Tr. at 1144. Therefore, most stripper well operators did not even have injection wells on their properties. If Congress had intended to benefit this specialized type of production it would have said so. It certainly cannot be presumed that it intended such a benefit."

The Court believes that this argument grossly distorts both the facts and the Congressional History of the Stripper Well Exemption. As noted earlier, at the time of the enactment of the measure by the Senate there was direct reference on the senate floor to the fact that the biggest percentage of production from stripper wells is secondary or tertiary recovery. See Remarks of Senators Cook and Bartlett quoted at pages 35 and 36. Moreover, the defendant's own expert testified that forty or forty-five percent of the stripper well properties were being waterflooded. It is totally inconceivable that Congress intended to exclude nearly half of the properties subject to the exemption. Indeed, it is probable that the defendant's expert was incorrect in his assessment of the number of wells engaged in secondary recovery operations. In 1973, over forty-five percent of the production from stripper wells was produced by enhanced recovery methods, according to statistical material from the Interstate Oil Compact Commission. See P.X. 157. Depending upon how this statistic was computed, it could well be that well over fifty percent of the stripper wells were producing oil as a result of a waterflood or fluid injection operation.

Likewise, in view of the undisputed engineering testimony in this case that ordinarily production costs on a primary producing well, i.e., those costs attributable to lifting the oil through the well bore are constant whether the volume of production is 100 barrels or 5 barrels a day, it is much more

likely that the senatorial remarks about increased expense of stripper production referred to the expert testimony concerning the considerable extra capital outlay necessary to install a fluid injection system for secondary or tertiary recovery.

In light of these undeniable facts, the defendant's contention that the stripper well exemption was intended to apply only to "wells in the primary production phase" is ludicrous. Thus, mere reliance on what the agency perceived to be the traditional scope of the term "stripper well" is, at best, a poor indicator of Congressional intent. The defendant aptly notes: "The legal question is not what the terms mean in the trade, but what Congress intended when it used those terms." *Mobil Oil Corp* v. *F.E.A.*, 566 F.2d 87, 92 (Em.App.1977).

Moreover, the Department's contention about the industry's understanding of the meaning of "stripper well" cannot stand in light of the evidence. The engineering experts on each side differed over whether an injection well has always been included in the industry usage of the phrase "stripper well." Compare, Whiting, T.210-12, with Burt, T.1047. The Court believes that the clearest indication of prior usage of the term "stripper well" can be found in the prior practices of the Department of Interior. As noted earlier, the DOI long included injection wells in the concept of stripper wells. This undeniable fact renders unpersuasive any argument that the industry does not include injection wells within the concept of stripper wells. Also, the unanimity and credibility of plaintiffs' expert oil engineers negates the Department's contention.

Contrary to the assertion of defendant's counsel that the only purpose of the exemption was the narrow one of exempting only recovery wells, the agency has always recognized that there were other purposes underlying the exemption. Ruling 1974-28 spoke of the purposes of the stripper well exemption:

> "The purpose of the Congress, in extending exempt status for the first sale of 'stripper well' production in the Emergency Petroleum Allocation Act of 1973 (Pub.L. 93-159) (EPPA), was to assure economic viability and continued production of crude oil from marginal oil wells. The

> legislative history of this exemption reveals that Congress understood the 'stripper well' concept in the same way that the oil industry applies the phrase, namely with reference to oil wells with such low production levels of crude oil that the producer received only a marginal return over cost of production."

Ruling 1975-12 also recognized a more fundamental purpose of the exemption when that ruling spoke of "the congressional policy of increasing the incentive and economic feasibility of maintaining production of crude oil from stripper well leases through advanced production techniques."

The defense counsel's argument about the intent of Congress seems to be based on the premise that the exemption was an arbitrary decision to grant relief to a narrow class of oil well owners which did not include owners of some properties with injection wells. The Court cannot agree with this basic approach. The Court believes that there were discernible reasons for the granting of the exemption. The defendant's approach begs the question of why Congress desired to grant an exemption to keep marginal wells operating. The purpose of the exemption as indicated by its legislative history, and even recognized by the DOE, was clearly to conserve oil resources and to encourage greater exploitation of marginal properties. The exemption must be construed in light of this purpose.

There are other indications of what Congress may have intended with respect to the counting of injection wells. "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived." *United States* v. *Fisher*, 2 Cranch 358, 386, 2 L.Ed. 304 (1805). The Court must consider these indications.

At several points in the Senate debate over the stripper well exemption, Senator Bartlett referred to the World War II subsidy program. 119 Cong.Rec. 23875. During the trial plaintiffs demonstrated that in Texas injection wells were counted to determine whether a property qualified for the subsidy. Any inference that this fact creates is weakened by the testimony that the Washington administrators of the subsidy may not

have been specifically told that injection wells were being included in the well count. (Baumel, T.678-79.) The evidence which showed that injection wells were counted to determine qualification for the subsidy, however, was the only indication of how those wells were treated in the subsidy program. This program was cited as a precedent by the exemption's sponsor. Congress may have intended to require that treatment of injection wells under TAPAA and EPAA exemptions be similar to the treatment accorded injection wells in the World War II program. The only evidence this Court has of how injection wells were treated under the prior program is the showing by plaintiffs that the injection wells in Texas were counted. This Court must conclude that this evidence provides a very limited amount of support for the plaintiffs' proposition that Congress intended to count injection wells.

This Court also believes that it is very probable that the legislators who sponsored and supported this exemption were familiar with the state practices and the treatment accorded injection wells by various states. The plain language of the exemption bears out this belief. Section (b) of the TAPAA exemption provided:

> "To qualify for the exemption under this section, a lease must be operating at the maximum feasible rate of production and *in accord with recognized conservation Practices.* . . ." (Emphasis added.)

States have for many years recognized water injection as a conservation measure and have taken action to encourage this procedure. The high probability is that the senators may very well have been aware of the practice of the states in counting injection wells as producing wells for various purposes, and may have intended a like treatment.

Use of the generic term "well" also indicates no intent to strictly limit the type of wells which could be counted. Indeed, the much more restrictive phrase "oil and gas wells," used in the IRS Code has been held to include injection wells. It runs counter to common sense to believe that a broader general term should read more restrictively than a narrow expression.

This Court believes that the most compelling evidence of what Congress intended by the stripper well exemption can be found in the DOI's interpretation of the stripper well exemption contained in the Mineral Land Leasing Act of 1920. The stripper well exemption contained in the 1935 amendments to that act exempted oil from the usual royalty rates, "Whenever the average daily production of the oil wells . . . shall not exceed ten barrels per well. . . ." This language is not significantly different than the TAPAA and EPAA exemptions which speak of leases whose "average daily production . . . does not exceed ten barrels per well. . . ."

Since the 1930's, the Department of the Interior has had in effect a regulation implementing this statutory exemption. As discussed earlier, this regulation identifies an active injection well as a commercially productive well, and specifies that injection wells should be counted. The underlying statute has been reenacted with this interpretation in force, and no effort has been undertaken to overturn this interpretation. In light of the consistent application of the DOI interpretation, and in light of the reenactment of the underlying statute, this Court must conclude that the DOI's interpretation and manner of treating injection wells was the one Congress intended. *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. 267, 275, 94 S.Ct. 1757, 1762, 40 L.Ed.2d 134 (1974); *N.L.R.B.* v. *Boeing Company*, 412 U.S. 67, 74-5, 93 S.Ct. 1952, 1957, 36 L.Ed.2d 752 (1973).

When Congress utilized language in a statute strikingly similar to language in an earlier statute, which language had been consistently interpreted, absent some strong indication to the contrary, Congress intended that the interpretation of the new statute be similar to that given the earlier statute. As heretofore noted, the purposes of the two statutes were similar. This Court can only conclude that the intent of Congress in using the phrase "average daily production . . . per well" was to include injection wells in the well count.

The defendant seems to think that the IRS and DOI regulations and statutes can be dismissed out of hand. The defendant

ignores the long-standing practice of construing language *in haec verba* in similar ways. See, e.g., *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 99 S.Ct. 2066, 2071, 60 L.Ed.2d 609 (1979); *Northcross* v. *Board of Education of Memphis City Schools*, 412 U.S. 427, 93 S.Ct. 2201, 2202, 37 L.Ed.2d 48 (1973). ("The similarity of language in [the two provisions] is, of course, a strong indication that the two statutes should be interpreted *pari passu*.") As stated in *Northcross*, this indication is even stronger when the statutes share a common *raison d'etre*.

Sutherland, in his treatise on statutory construction recognized the principle:

> "On the basis of analogy the interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships. By referring to other similar legislation, a court is able to learn the purpose and course of legislation in general, and by transposing the clear intent expressed in one or several statutes to a similar statute of doubtful meaning, the court not only is able to give effect to the probable intent of the legislature, but also to establish a more uniform and harmonious system of law." (§ 53.03.)

An example of this process which the treatise cites is *Overstreet* v. *North Shore Corporation*, 318 U.S. 125, 63 S.Ct. 494, 87 L.Ed. 656 (1943). *Overstreet* involved the meaning to be given the phrase "engaged in commerce," which was used in the Fair Labor Standards Act. The Court held that the test to be applied was that test utilized under the Federal Employers' Liability Act. The Court recognized that the two statutory provisions were "not strictly analogous, but they are similar," and noted that they were aimed at the same problem. 318 U.S. at 131-32, 63 S.Ct. at 498.

Sutherland also points out the value of this approach:

> "Harmony and consistency are positive values in a legal system by reason of serving the interests of impartiality and minimizing arbitrariness. The practice of construing statutes by reference to other statutes is based upon the sound public policy of advancing those values." (§ 50.01.)

The desirability of harmony and consistency of law is easily seen in the present case. Certain properties subject to both the DOI stripper well regulations and the DOE stripper well regulations, are involved in this litigation. The disparate treatment accorded injection wells by these cabinet level departments has prompted one producer to ask: "How can one department of the Executive Branch (Department of Interior) lawfully count injection wells while two other departments (DOE and Department of Justice) are . . . defending in the courts the federal regulations which make the counting of injection wells illegal?" Exhibit to plaintiffs' trial brief 53. As stated in our original opinion, such a situation in a democratic government poses a legal monstrosity or contradiction that undermines the necessary citizen confidence in the fairness and/or justice inherent in our governmental system. Consistency is a jewel to which government should adhere. See 447 F.Supp. at 1149-50.

The definitive test for the proper interpretation of any statutory provision is whether a given interpretation will fulfill the congressional goals and purposes of the statute. There are no principled reasons for the proposition that including recovery wells in a secondary recovery project while excluding injection wells will serve any purpose of the statute. The contribution made by these two types of wells to the process of production are similar. But for injection wells, large amounts of oil would never be produced. The costs of drilling or maintaining injection wells are as large or larger than comparable costs on a recovery well. Because of natural forces, a provision allowing the counting of injection wells has no greater potential for abuse than a provision excluding the counting of injection wells. Likewise, as noted, state oil regulatory practices are designed to prevent industry abuse. The statutory goals of preventing shutdown of marginally productive properties, of producing domestic oil that would otherwise be purchased from foreign sources, and of flushing more oil out of the oil reservoirs, are all served by allowing injection wells to be included in the well count.

The record contains some indication that the exclusion of injection wells was the result of the agency's desire to defeat the congressional decisions embodied in the stripper well exemption statute. The agency was opposed to the exemption from its inception:

> "The proposed exemption was clearly inflationary and not likely to increase oil availability significantly over the short to medium term. On October 20, 1973, Dr. Dunlop announced strong opposition to the measure. He stated: 'The Council is strongly opposed to price increases of this magnitude. We are committed to stabilizing petroleum prices while encouraging the production of all available crude oil. This amendment, if enacted, would produce unacceptable rates of price increases. This amendment is particularly undesirable since it would produce no added supplies—only higher prices.
>
> 'In fact, the language of the amendment would encourage gerrymandering of leases to take advantage of the exemption and encourage reduced levels of production from larger wells. This amendment could take billions of dollars from the pocketbooks of all Americans.'
>
> "Despite the Council's objections and the obvious inflationary aspects of this bill, the Conference Committee reported the bill on October 23, 1973. The Conference Committee did, however, alter the bill to include only wells producing 10 barrels or less per day."

Historical Working Papers on the Economic Stabilization Program, August 15, 1971, to April 30, 1974, p. 1308 (G.X. U-1).

At the time of the passage of the Act, the Congress rejected the agency's "cost benefit" analysis, and defined national policy to require that properties with wells which produced less than 10 barrels per day be exempt from price controls. The testimony of Phillip Essley shows that the agency was unreceptive to this congressional mandate. This Court believes that the entire testimony of Essley is merely post-hoc rationalization

that cannot form a proper basis for upholding the agency.[8] His testimony did represent the agency's apparent unwillingness to be bound by what they perceived to be an unwise statute. Essley testified about this issue as follows:

> "[W]e are only talking in this case about that increment in which per well, per producing well, is above ten barrels per day, and probably less than 20—somewhere between 16 and 20—that were we to adopt this particular suggested amendment, or change, would qualify the leases for stripper well production that were not previously qualified. Now, most of those leases, most of those leases, most wells, are going to be above the economic limit of ten barrels a day.
>
> Q. What data do you base that on—
>
> A. I base that on long experience in the industry, and knowledge of cost of production, what my own company production has been, and from experience in the stripper well area of Kansas, where I knew what the cost in that area was. I base it upon a very, very large experience. I also base it on the fact that I called an individual on several times, and we were discussing whether or not wells were being abandoned and was assured that just no wells about ten barrels per day were being abandoned, or if they were there were very, very few. They just did not know of any. So, we

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[8] Were this Court to consider Mr. Essley's cost benefit analysis as a basis for the final agency decision, the Court would consider evidence such as that offered by Union Oil of California to disprove the conclusion.

Some of Mr. Essley's testimony was also simply wrong. He demonstrated an incorrect understanding of the system of allowables in Texas (T. 1145, 1179-80), and of the meaning of the DOI regulation (T. 1179). The Court is also truly appalled at the method Essley used to develop his cost benefit basis for his recommendation that injection wells should not be included. The eagerness with which Essley rejected learned studies in favor of his own speculations makes one appreciate the fact that administrative decisions are subject to review.

> are talking about here most production in this category would probably still be above the economic limit."

(Essley, T. 1236-37.)

Clearly, the agency was substituting its own views as to the proper level of economic limits. Congress had determined through the statute that additional production incentive was required when one well could produce only ten barrels of oil per day. It makes no sense for the agency to state that no additional incentive was required if two wells (one of which is an injection well) can produce twenty barrels of oil per day, where the costs of production are twice the costs of a single well. Clearly, the agency has substituted its judgment for the legislative determination of Congress, and returned to its original position that the exemption was not needed. Each argument which Essley made in opposition to including injection wells was equally applicable to recovery wells, and was implicitly rejected by Congress when Congress enacted the statute.

This Court therefore holds that the agency's decision to exclude injection wells from the well count for the purposes of determining average daily production was beyond the authority of the agency, and was contrary to the intent of Congress. The intent of Congress, as seen in the purpose and history of the measure, as well as the intent inferred through the application of appropriate canons of construction all indicate that injection wells should be counted. These considerations outweigh any deference due the agency's interpretation. Furthermore, as is explained and held in the following part of this opinion, the agency's action was arbitrary and capricious so as to completely obliterate any legal doctrine of deference.

IV. THE DOE'S DECISION TO EXCLUDE INJECTION WELLS WAS ARBITRARY, CAPRICIOUS AND A GROSS ABUSE OF DISCRETION

Were this Court to assume that the agency's exclusion of injection wells could be reconciled with the statutory exemption, the agency's regulation excluding the counting of injection wells still could not stand.

The standard of review to be applied to the regulation at issue in this case is clear. TECA, in *Duncan* v. *Theis*, 613 F.2d 305, 309 (Em.App.1979), recognized that there existed unresolved issues as to whether the regulation in question was "arbitrary, capricious or unreasonable in the light of, or is in conflict with, or is beyond the authority granted by controlling statutory provisions. . . ." This standard stems from *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), and its progeny.

In *Overton Park*, the Supreme Court was faced with a challenge to a decision of the Secretary of Transportation. The Secretary was restricted under a statute to allow federal funds to finance construction of highways through public parks only if no "feasible and prudent" alternative existed. The Secretary in *Overton Park* had made an informal determination that no feasible and prudent alternative existed to building a highway through Overton Park and a public interest group challenged the action. The Supreme Court stated that, prior to upholding the agency's action, the Court must find that the actual choice made by the Secretary was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

> "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

401 U.S. at 416, 91 S.Ct. at 823-24.[9]

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[9] The Court is troubled by this formulation of the standard of review. The phrase "clear error of judgment" smacks of the "clearly erroneous" standard. It is clear, however, that these two standards are not the same. See generally, K. Davis, Administrative Law Treatise, § 29.01-2, 1980 Supp. This Court agrees with the approach taken by the Court in *Ethyl Corp.* v. *E.P.A.*, 541 F.2d 1, 34 n.74 (D.C.Cir.1976), and believes that this formulation of the standard is

The *Overton Park* statement of the arbitrary and capricious test has consistently been applied by TECA. *Texaco, Inc.* v. *F.E.A.*, 531 F.2d 1071, 1076-77 (Em.App. 1976); *Grigsby* v. *D.O.E.*, 585 F.2d 1069, 1074 (Em.App.1978), *cert. denied*, 440 U.S. 908, 99 S.Ct. 1216, 59 L.Ed.2d 456 (1979); and *Mobil Oil Corporation* v. *D.O.E.*, 610 F.2d 796, 801 (Em.App.1979), *cert. denied*, 446 U.S. 937, 100 S.Ct. 2156, 64 L.Ed.2d 790 (1980). In *McCulloch Gas Processing Corporation* v. *D.O.E.*, 650 F.2d 1216 (Em.App.1981), TECA specifically restated the test:

> "In summarizing the appropriate scope of review under the arbitrary and capricious standard the Supreme Court in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 441-42, 42 L.Ed.2d 447 (1974), held that a reviewing court must determine whether the decision of the agency was based on a consideration of the relevant factors, whether there was a clear error of judgment, and whether the agency has articulated a rational connection between the facts found and the choice made. The Court noted that under the arbitrary and capricious standard the scope of review is a narrow one, and while the reviewing court 'may not supply a reasoned basis for the agency's action,' it should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' " (At 1221.)

The defendant contends that it is inappropriate to apply the "relevant factors" test to this case. The defendant contends that this test is applicable only where there are statutorily prescribed factors to consider. In support of this position, the defendant cites *Kollet* v. *Harris*, 619 F.2d 134 (1st Cir. 1980); *Commodity Futures Trading Commission* v. *Hunt*, 591 F.2d 1211 (7th Cir. 1979); and *Environmental Protection Agency* v. *National Crushed Stone Association*, 449 U.S. 64, 101 S.Ct.

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best read as no more than an affirmation of the traditional standard of review. Accordingly, in the context of "arbitrary and capricious" review, we shall reverse for a "clear error of judgment" only if the error is so clear as to deprive the agency's decision of a rational basis.

295, 66 L.Ed.2d 268 (1980). These authorities themselves refute this argument.

In *Kollet*, the Court did not read the relevant factor test to direct:

> "a court to set aside duly promulgated regulations, and order a new rulemaking, every time the administrative record does not affirmatively show whether the agency specifically addressed some particular factor which a court later feels is not irrelevant. . . . Since, under 5 U.S.C. § 553(c), an agency is required only '[t]o incorporate in the rules adopted a concise general statement of their basis and purpose,' not to enumerate every conceivable factor that entered the decision-making process, it is not always possible for a court to determine what consideration a particular factor received. As a leading commentator suggests, if the administrative record indicates the agency considered at least the major factors, failure specifically to address less salient points would seem an insufficient reason to set aside the rules. Davis, Administrative Law of the Seventies 666 (1976). We are satisfied from the administrative record before us that the Secretary gave sufficient attention to a *wide range of issues including the general type of matters mentioned by the district court so that the regulations promulgated cannot be invalidated for failure to consider relevant factors.*"
> (Emphasis added.)

619 F.2d at 140-141. A close reading of the opinion shows that the district court had considered such factors as "regional variations in the cost of living." 619 F.2d at 142. These factors are not statutorily prescribed factors.

In *Commodity Futures Trading Com'n.* v. *Hunt*, supra, the Court noted that there was no indication that the agency "ignored any particular set of 'relevant factors' in reaching its determination. 591 F.2d 1211, 1217.

In *Environmental Protection Agency* v. *National Crushed Stone Association*, supra, the Court invalidated a Circuit Court determination that imposed the requirement that an agency take into account certain statutory factors. The Su-

preme Court held as a matter of statutory construction that these certain factors were not required to be considered. The Court noted, however, that the decision of the Court of Appeals would have been "logical" if the factors listed bore a substantial relationship to the considerations underlying the statutory requirement. 101 S.Ct. at 302.

Indeed, TECA has repeatedly rejected the test defendant now urges on this Court:

> "The standard of review of agency action alleged to be arbitrary and capricious is not simply whether there exists a rational basis for the action. Rather, as noted in *Texaco, Inc.* v. *FEA* [531 F.2d 1071 (TECA 1976), cert. denied, 426 U.S. 941, 96 S.Ct. 2662, 49 L.Ed.2d 394 (1976)], the inquiry is 'whether the decision was based on a consideration of relevant factors, whether there has been a clear error of judgment and whether there is a rational basis for conclusions approved by the administrative body.' 531 F.2d at 1076-77. The enumeration by the *Texaco* court of the three elements in the conjunctive negates any implication that the rational basis test alone can suffice."

Mobil Oil Corporation v. *D.O.E.*, 610 F.2d 796, 801 (Em.App.1979).

The defendants, in criticizing the relevant factors test, demonstrate a basic misconception of the Court's role in scrutinizing agency decisions in general and informal rulemaking proceedings in particular. The Court's role in such a proceeding was given careful and scholarly treatment in *Ethyl Corp.* v. *Environmental Protection Agency*, 541 F.2d 1, 33-37 (D.C.Cir. 1976). This en banc opinion authored by Judge Skelly Wright masterfully sets forth the requirements that the Court carefully scrutinize the record:

> "A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do

> not deviate from or ignore the ascertainable legislative intent."

541 F.2d at 35-36, quoting *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 850 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 2233, 29 L.Ed.2d 701 (1971). The Court's role is not to substitute its judgment for that of the agency, 541 F.2d at 34, and affirmance is required if a rational basis exists for the agency's decision. Id. "This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time consuming) ritual." Id.

The function of the rational basis test is to reconcile these possibly conflicting roles:

> "The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. . . . The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise. . . . The immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors."

541 F.2d at 36 (emphasis in original). The relevant factors test thus stems from the recognition that judges are not experts in an area, so they cannot determine if a decision is "wrong" in some absolute sense. The relevant factor test simply requires that the Court determine the underlying issues or factors the agency must consider in order to reach a rational result. To avoid the classification of "arbitrary," the decision must be made on a consideration of the underlying issues. The reasoning the agency used in reaching its conclusion is only important to ascertain that the holding is a rational resolution of the

problem. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749, 92 S.Ct. 1941, 1946, 32 L.Ed.2d 453 (1972).

An example of the application of this test by a reviewing court is the recent TECA decision in *McCulloch Gas Processing Corp.* v. *D.O.E.*, supra. In *McCulloch*, the Court was faced with a challenge to a regulation which had been formulated through the notice and comment provisions of 5 U.S.C. § 553. The Court in that case had available for consideration a lengthy explanation of the reasons that the DOE adopted this regulation, and TECA engaged in a rather close scrutiny of these reasons. For example, one of the provisions attacked by the plaintiff was a restriction which allowed interest cost passthrough only when interest payments were made to an "unrelated entity." Of this provision TECA said:

> "The DOE did not explain, either in the notice of proposed rulemaking or in the preamble to the final rules, why the passthrough of interest payments should be limited to an 'unrelated entity.' We may properly inquire into whether there was a contemporaneous explanation of the agency decision to preclude passthrough of interest on loans from related corporations. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, supra, 435 U.S. [519] at 549, 98 S.Ct. [1197] at 1214 [55 L.Ed.2d 460]; *Bowman*, supra. *The DOE did not even discuss the relevant factors considered in imposing the restriction.* The DOE's failure warrants the district court's finding that the restriction on passthrough of interest to unrelated entities only is arbitrary and capricious." (Emphasis added.)

At 1225. The Court then went on to reject rationales urged by the DOE, holding that there was no articulated bases for agency assumptions, that the conclusion was based on "sheer speculation," and that the rationales were not persuasive. Id. A simple reading of this opinion makes it certain that TECA was not restricting the "relevant factors" to those found in the statutory list, but was adopting the approach set out by the court in *Ethyl*, identifying those factors which were relevant to a reasoned decision of the issue, and then looking at whether those factors were considered by the agency in reaching their conclusion.

Another example of the process applied to review of an informal rule is found in *Almay, Inc.* v. *Califano*, 569 F.2d 674 (D.C.Cir. 1977). At issue in that case was the validity of a regulation governing hypoallergenic cosmetics. The F.D.A. had engaged in notice and comment rule-making and defined hypoallergenic as "less likely to cause adverse reactions than [10 percent of the market of] similar-use competitive products in the same category." The court applied the "arbitrary or capricious" test to the regulation. In doing so, the court rejected a test urged by the F.D.A.:

> "FDA would have us believe that informal rulemaking means that 'the record of the proceeding is not required to contain "evidence" to support the ultimate determination made,' and that in promulgating a regulation by informal rulemaking, an agency may rely on its own experience and expertise, so long as those factors appear in the record and the resulting decision is rational, arguing in effect for a type of 'super-presumption of correctness standard.' "

569 F.2d at 680. This standard, the court felt, would tend to render the appellate process a superfluous ritual. Id. at n.4. The court went on to hold that the "arbitrary and capricious" standard "cannot mean that *nothing* of an evidentiary nature is needed in the administrative record to support an agency decision." 569 F.2d at 681. After careful scrutiny of the record, the court concluded:

> "The only bases in the administrative record for the Commissioner's definition are conclusions drawn from a dictionary that does not employ the chosen definition, an AMA report recommending against any use of 'hypoallergenic,' and an FTC survey, the unreliability of which is apparent on its face and indicated by its sponsor. "Under such circumstances we are compelled to find that the action of the Commissioner was arbitrary and capricious."

569 F.2d at 682-83.

On the basis of these cases, this Court must conclude that the "relevant factor" test is an integral part of the "arbitrary and capricious" test, and that the record of the administrative

decision must affirmatively show consideration of the relevant factors underlying the regulation to sustain that regulation.[10]

Earlier, this Court determined that a facial examination of the regulation, ruling, statute and congressional history, was inadequate to determine if the agency had considered relevant factors in promulgating this regulation. This Court therefore allowed discovery into the administrative record on which the regulation was based. This procedure was adamantly and strenuously objected to by the defendant's counsel, but the Court held that since the agency had not articulated its findings on the record, since there was no contemporaneous explanation of the agency decision, and since there was no explanation to establish an adequate basis to support this rule, this Court was required to go behind the face of the regulation to review it. The lodestone basis for such trial court action is *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, supra. This procedure has been approved by TECA. *McCulloch Gas Procession Corp.* v. *D.O.E.*, supra. The discovery material in these cases at bar was carefully screened so as to minimize the release of privileged material, and was released only after the

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[10] The Court earlier held that the regulations were procedurally valid legislative rules. 447 F.Supp. 1135, 1150. The defendant has not and cannot now argue that these regulations are merely interpretations, so as to avoid the "relevant factors" requirement. These regulations when issued contained a finding that "good cause" existed for failure to follow the usual notice and comment procedures. As the Court noted in *Mobil Oil* v. *D.O.E.*, 610 F.2d 796, 803 (Em.App.1979):

> "If the DOE had concluded that either its statutory authority or the existing regulations were in need of clarification by way of an interpretative ruling, then it would have had no reason to incorporate a finding of good cause."

The record is clear that the defendant intended the regulation to have the force and effect of law, and therefore is subject to scrutiny under the arbitrary and capricious test.

Court found that release would not harm the administrative processes as a result of the release of the materials.

It must be remembered that the regulation contains no reasons for the inclusion of the language which has been held to exclude injection wells from the well count. The written materials which the DOE has identified as the agency record on which the regulation was based contains no references to the counting of injection wells. The only reference made in this written material to secondary recovery projects is contained in a memo dated October 19, 1973 (P.X. 56). This reference can be read either to anticipate the inclusion of injection wells in the well count, or not to. The written material before the agency contains no basis for a decision either to include or to exclude injection wells.

Depositions of the primary decision makers were permitted to be taken to attempt to determine on what rationale or evidence the agency based the decision not to include injection wells. A reading of the record makes it manifestly clear that the agency had *no basis* at all for making its determination. The agency did not consider the impact which excluding or including injection wells would have on domestic petroleum reserves (Walker, D. 53), or on domestic oil production (Id.). The agency did not consider the role and function of injection wells in the recovery of crude oil. (Walker, D. 53-54.) The agency did not consider the extent of capital costs in secondary recovery projects. *(Id.)* The agency did not consider whether inclusion or exclusion created an incentive or disincentive for establishing secondary recovery projects (Walker, D. 55), or whether exclusion of injection wells would lead to premature abandonment of marginal properties. (Id.) The agency did not consider the treatment of injection wells by state agencies or by other agencies of the federal government. (Walker, D. 55-56.) In short, the agency considered no "studies, analyses, information or facts" prior to the promulgation of the regulation. (Walker, D. 56-57.)

The defendant in this trial did not seriously challenge the fact that the agency considered nothing prior to enacting the

regulation. The defendant relied upon the testimony of Michael Ware, an official who acted in an administrative capacity in the Energy Division of the Cost of Living Council. This individual was, if at all, only tangentially involved in the promulgation of the regulation. He testified that the only discussion of, or reference to, the injection well issue prior to the promulgation of the regulation was contained in the October 19th memorandum. (Ware, T. 1002-3.) Ware stated that the economic environment was an important consideration of the agency in issuing this regulation, and the department was concerned about the exemption hindering its attempt to restrain inflation. (Ware, T.943.) This goal, however, did not play any part in the decision to exclude injection wells as the agency did not consider the impact its decision would have on crude oil prices prior to issuing the regulation. (Walker, D. 54.)[11]

The possible failure of the agency to consider these factors may have been because the agency did not realize the import of the language which it had chosen. George Biondi, the person within the agency who actually drafted the regulation, disclosed the reason that the phrase "wells which produce crude petroleum" was used in the regulation:

"Q. Well, tell us then, the reason why you included the phrase, 'wells which produce crude petroleum?'

A. Yes. As I said, we saw a need to describe the item—it is not a term of art here—the items that we were addressing ourselves to. We were trying to describe the things that were exempt. So while the catch

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[11] Mr. Ware also testified to an absurd understanding of the scope of the stripper exemption. He testified that the stripper exemptions were not intended to apply to secondary recovery operations. (Ware, T. 1002-03.) Such an understanding has no basis in fact in light of the basic engineering axioms, and such observations in the Senate debate as "by far the biggest percentage of production from stripper wells, 10 barrels or less, is secondary or tertiary recovery." Remarks of Senator Cook, 119 Cong.Rec. 23878 (July 14, 1973).

phrase that you have referred to stops with crude petroleum, we listed items that we thought were also crude petroleum and that were statutorily exempt. I think those were petroleum condensates and natural gas liquids. So that what we were trying to address in saying wells which produce petroleum, petroleum condensates and natural gas liquids were those wells that we were talking about being within the exemption.

. . . . .

Q. Was the inclusion of the phrase 'wells which produce crude petroleum condensates, et cetera,' which follows the word 'wells' intended to be descriptive?

A. Sure.

Q. Was it in any way intended to be a definition of the type of wells to which the statutory stripper exemption applied?

A. The type of wells, no.

Q. The type of wells?

A. No.

Q. All right. Was the inclusion of the language, 'wells which produce crude petroleum,' intended to exclude the counting of injection wells in the well count?

A. Not to my knowledge, no." (Biondi, D. 41-43.)

Biondi stated that the heading to Section 406 of the TAPAA contained a reference to natural gas, whereas the body of the statute referred only to crude oil. The phrase "wells which produce crude oil" was included to insure the exemption would not be claimed to cover natural gas. (Biondi, D. 39-41.) Incredulously, Biondi also testified that at the time he drafted the regulation he did not even know what an injection well was! (Biondi, D.33.)

More support that the present interpretation of the regulation language was unintended comes from William Walker,

previously quoted, who was general counsel for the Cost of Living Council at the time of the enactment of the regulation:

"A. But I do not recall that in connection with the stripper well exemption that we focused with any precision on the issue of secondary recovery.

Q. Or injection wells?

A. Or injection wells. Now, we made plain to the Congress, the administration and the internal memoranda to which you have referred our concern generally about gaming the system and what has been called gerrymandering and so on, and our desire to draw the exemption narrowly. But I am not aware of any specific discussion with respect to injection wells in the course of the development of that regulation.

Q. Let me ask you this, Mr. Walker: would your desire to narrowly construe and interpret the stripper exemption necessarily mean that you intended to exclude the counting of injection wells in determining average daily production?

. . . . .

A. We . . . I don't think we intended to include them or exclude them, Mr. Kennedy; we simply—we were not focusing on the injection well issue in the drafting of that regulation." (Walker, D. 52-53.)

Even the defendant's witness, Ware, went out of his way to agree with the foregoing statement of Walker. (Ware, T. 996.)

Based on this undisputed record, the Court must conclude that to the extent that the regulation excludes injection wells from the well count, it was issued in a manner which was arbitrary, capricious, and a gross abuse of discretion. The record discloses that the exclusion contained in the regulation was not the result of any semblance of reasoned decision making, but rather was the result of happenstance, and an unintended construction of language contained in the regulation. The agency failed to consider any factors which could be deemed relevant. The agency failed to consider any facts. The

agency did not consider whether excluding injections wells would further or hinder the congressional purposes underlying the stripper well exemption. Bluntly stated, neither ignorance of the subject matter nor vacuity of thought processes can amount to consideration as a thought process accomplishment of a government agency. The agency's process in arriving at the regulatory exclusion of injection wells must be deemed "arbitrary" under any construction of that word.[12]

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[12] In fact, the defendant argues that no reasoned decision need be made. For support, defendant cites *Barr* v. *United States*, 324 U.S. 83, 90, 65 S.Ct. 522, 525, 89 L.Ed. 765 (1945):

> "If Congress had made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators."

The defendant fails to realize that there are essential differences between the legislative power to make statutory laws and the administrative power to implement a statutory law with regulations. Were this Court to accept the defendant's contention, it would be forced to accept arbitrary results which arose from a fortuitous phrase contained in a regulation. It is the Court's duty to guard against arbitrary actions by agencies. To accept the defendant's theory would be to abdicate this responsibility.

TECA has determined that it is the legislative rule which exluded injection wells. *Duncan* v. *Theis*, 613 F.2d 305, 307-08 (Em.App.1980). This Court would not require an agency to foresee all possible implications of its regulations. Rather, this Court would only require that issues which a regulation resolves be decided on some rational basis. Issues unresolved by a regulation may later be decided by new rule making procedures, or by interpretive rules.

Were these actions the result of an interpretive ruling, this Court would be free to substitute its judgment as to the proper interpretation. Interpretive rules do not bind the Court.

> "The Courts may find them persuasive and may treat them as if they were binding, but the courts have the reserve power to substitute their own judgment on all questions of statutory

Moreover, the record fails to disclose any basis which could serve as a rational basis for differentiating between injection and recovery wells for the purpose of this exemption. Clearly, Congress intended a narrow construction of the statute, but an arbitrary construction could not have been intended. The engineering facts disclose that an injection well is physically similar in construction to a recovery well. (See Appendix "A.") The costs associated with drilling and maintaining an injection well are as great or greater than costs associated with drilling or maintaining a recovery well. The only distinctions offered by the defendant are: (1) that injection wells do not actually

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interpretation. The preliminary power of interpretation is in the agency, but the final power of interpretation is in the courts."

Energy Reserves Group, Inc. v. *D.O.E.*, 589 F.2d 1082, 1093 (Em.App.1978), quoting K. Davis, Administrative Law of the Seventies, § 5.03-1, l.c. 152.

Contrary to the defendant's argument, a determination that the interpretation was "reasonable" would not be made solely by reliance upon the language of the regulation. As noted earlier, reliance on the plain language of the regulation is risky, at best. See p. 1257, supra. In evaluating the reasonableness of the interpretation, the Court would have to undertake virtually the same inquiry into congressional intent and historic facts it has had to take in this case, and would conclude that the interpretation is wrong in light of the factual circumstances and the statutory language and purposes.

This Court can paraphrase a statement by TECA in an analgous case:

> "In view of the circumstances already referred to it would, indeed, by a tyranny of words rather than a recognition of ideas portrayed by words to narrowly construe the definition of [average daily production per well] in the manner [DOE's] argument on 'plain meaning' would have us do."

U.P.G., Inc. v. *Edwards*, 647 F.2d 147, at 152 (1981).

To accept the defendant's theory would allow the agency to bootstrap an arbitrary decision into a regulation having the force of law, without following any procedures or considering anything.

emit hydrocarbons, and (2) the contribution to production of an individual injection well cannot be determined with precision. These are distinctions without difference. The engineering contribution of an injection well is undisputed. The water forced into the reservoir, via the injection well, provides energy pressure, displaces crude oil, and forces oil from the reservoir into the well bore of a recovery well. The fact is that but for the injection wells, such crude oil would not have been obtained. It could not be produced under known oil production methods. Whether the oil is brought out of one well bore or a different well bore simply does not matter. The fact that the contribution of an individual injection well cannot be measured does not matter. The statute provides that the exemption is to be based on the production of the lease. Whether any one injection well contributes one barrel of oil per day or 100 barrels of oil per day matters no more than whether a given recovery well recovers one barrel of oil per day or 100 barrels of oil per day. Only the total number of wells is of importance. The problems which the Congress envisioned are equally addressed by allowing injection wells to be included in the well count as by allowing recovery wells to be so counted.[13] In fact, the DOE's position would be as defensible if it had excluded recovery wells and included only injection wells in the well count on secondary recovery projects. Excluding injection wells seems as nonsensical as would be a decision to exclude fathers from a count of parents.

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[13] For example, first consider the case of a lease containing two recovery wells, each producing 10 barrels of oil per day through each physical well bore. Under the DOE interpretation this lease would qualify. Next, consider the case of another lease containing two wells, one an injection well and the other a recovery well. If the production of the second lease is 20 barrels of oil per day through the one physical well bore, the property would not qualify under the DOE interpretation, even though the costs faced by the two leases are identical and each are subject to the same disincentive effects envisioned by Congress. The second lease would seem to be as economically marginal as the first lease. The Court can envision no principled reason these two leases should be treated in different manners, and the defendant has offered no reason.

The defendant should not be surprised that the Court is unable to find a meaningful distinction between injection wells and recovery wells for the purpose of this statute. Since 1940, courts have had difficulty in finding some basis for affording these wells dissimilar treatment. In *Page Oil Co.* v. *Commissioner of Internal Revenue Service*, 41 F.T.A. 952, 963 (1940), *aff'd*, 129 F.2d 748 (2nd Cir. 1942), the Court refused to allow deduction of the costs of drilling an injection well, holding:

> "that the [water injection wells] involved in this proceeding [were] sufficiently similar to oil wells to require the same tax treatment."

To reiterate, the record before the Court convinces this Court that the actions of the agency not only constitute an example of arbitrary actions, but also show a complete abdication of any semblance of reasoned decision making. The type of actions which occurred in this dispute are the type of actions which judicial review was designed to correct. Only if this Court were to disregard his duty to check arbitrary irrational actions of an agency could he allow the regulation as interpreted to stand. To sustain the defendant's position would be to ignore the facts in the record and exhaust the notion of deference to an agency decision into a belief that an agency can do no wrong, and to reduce the idea of judicial review to a mockery.[14]

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[14] Comment was made at the inception of this opinion about the particularly adversarial legal tactics and attitudes displayed by most of defendants' counsel throughout the course of the litigation—the impression conveyed being that no discovery or trial in this matter should be countenanced by this Court in deference to administrative expertise by the series of agencies and/or departments involved in the administration and enforcement of the series of legislative acts. As a result of the discovery permitted and the evidence introduced at the trial, the motivation or reason for the actions of the government's counsel seems quite apparent, i.e., the necessity of maintaining a veil of secrecy about the administrative action taken relative to implementation of the so-called stripper well exemption. As indicated in

V. POST TRIAL MOTIONS

Also for decision are the post trial motions of the defendant to reopen the record for the inclusion of two letters as exhibits, and to allow the defendant to supplement response to certain interrogatories.

The Court believes that the first motion to reopen the record should be granted. The letters sought to be admitted into evidence are innocuous and basically cumulative of the evidence already before the Court. The Court can foresee no prejudice befalling the plaintiffs from the inclusion of these two documents in the record. At the conclusion of the trial the Court indicated that he would accept material from either side which had not been offered due to oversight or some other valid reason. This material falls within that category, and the Court sees no reason for not making it a part of the record. This motion is therefore granted.

The motion to allow the defendant to supplement its answer to certain interrogatories after trial, however, does present a different issue. The plaintiffs properly characterize this motion as "bizarre." The reason for this unusual motion, according to the defendants, is that although the defendants do not believe

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prior orders in this case, this Court is well aware of the facts and basis of asserting governmental privilege or immunity to probe debate on governmental policy in an agency. However, as here, where congressional intent was misread or half-read as to pursuing blind enforcement aims over conservation aims to satisfy agency views rather than congressional intent, governmental privilege or immunity cannot be a shield to disclosure. Nor, as here, where pretrial discovery denotes ignorance of facts upon which agency action should be based, can such ignorance by governmental personnel of the subject matter which they are regulating be a deterrence to judicial fact finding or a barrier to justify nondisclosure on immunity grounds. Ignorance should never be a shield for governmental executives or employees in a democratic form of government.

they operated under any duty to supplement the interrogatories,

> "because of plaintiffs' disingenuous attempt to use some of these incomplete responses, defendants are filing amended answers in the event the Court holds supplementation necessary to prevent any prejudice to defendants from plaintiffs' purported reliance on them, and to clarify the record."

To better understand this motion, that portion of the transcript containing the "disingenuous" use of the interrogatories is attached to this order as Appendix "B".

The Court is mystified by the arguments the defendants raise in support of this motion. The first argument is that defendants were under no duty to supplement their responses. It escapes the Court why the absence of such a duty would allow the defendants to tender the amended answers and have them accepted.

The second portion of the defendants' brief in support of this motion is a section stating how, if the Court finds that supplementation was required, the Court ought to accept the revised answers to the interrogatories. Again, however, the Court fails to see the nexus between the existence of a duty to amend interrogatories and the post trial motion of the defendants to supplement responses.

Finally, the defendants argue that "any attempt to hold defendants to what are now shown to be incomplete or misleading responses would thwart the search for truth in the fact-finding process." The Court believes that if the original responses created the great prejudice which the defendants now claim, the defendants would have acted sooner to correct the "incomplete or misleading responses." The defendants should not now complain that their earlier failure justified such an extraordinary measure.

This Court has been unable to find precedent for this motion, and is confident that none exists. The Court, therefore, is at a loss as to the proper approach to take to this motion. Were this

Court to consider the present motion as a motion to reopen the record to include more evidence, the motion would be denied. When offered on behalf of the responding party, answers to interrogatories are generally inadmissible hearsay evidence. The supplemental answers are no exception.

Were this Court to consider the motion as one to supplement answers to interrogatories, the motion would be denied. Supplementation of answers is required to be made at an appropriate time. Four weeks after trial under any circumstances is not the appropriate time. See, *Matlack, Inc.* v. *Hupp Corp.*, 57 F.R.D. 151 (E.D.Pa.1972).

The Court cannot understand why the defendants are bothering to assert this motion. Clearly, the defendants were not bound by the answers to the interrogatories, and were allowed to present evidence which was contrary to those answers at trial. The answers to interrogatories which were admitted by the Court constitute evidence which must be weighed by the Court. See, Wright & Miller, Fed.Prac. & Proc. § 2181. The Court believes that the only purpose which would be served would be to allow the defendants to eliminate the admittedly "incomplete and misleading" answers and mitigate the sting created by plaintiffs' counsel's excellent use of these answers.

It would be highly improper and unfair to the plaintiffs if this Court would allow the defendants to promulgate answers to interrogatories after trial, and then consider these answers without affording the plaintiffs an opportunity to respond. Allowing amendment followed by response could amount to a retrial of the entire case. The Court does not believe that such a course is at all proper.

This motion raises the specter of an attempt to conform the evidence to reflect what was presented at trial. Any Court's job would be greatly simplified if counsel for litigants could in post trial proceedings eliminate any conflict in their evidence, and restructure the evidence so that their case is a homogenous, credible and logical whole. The usual course of

proceedings, where development of the facts precede the trial, appears to be the only way that the truth-finding mission of this Court can be fulfilled. The defendants' motion to modify this traditional course of events borders on the frivolous.

The Court is cognizant that this is an M.D.L. proceeding and not all parties to the M.D.L. joined in this trial. The Court, therefore, will allow the defendants to include the supplemental responses in the discovery materials for use in subsequent cases, should it become necessary to try other cases, which appears now to be most doubtful.

VI. CONCLUSION

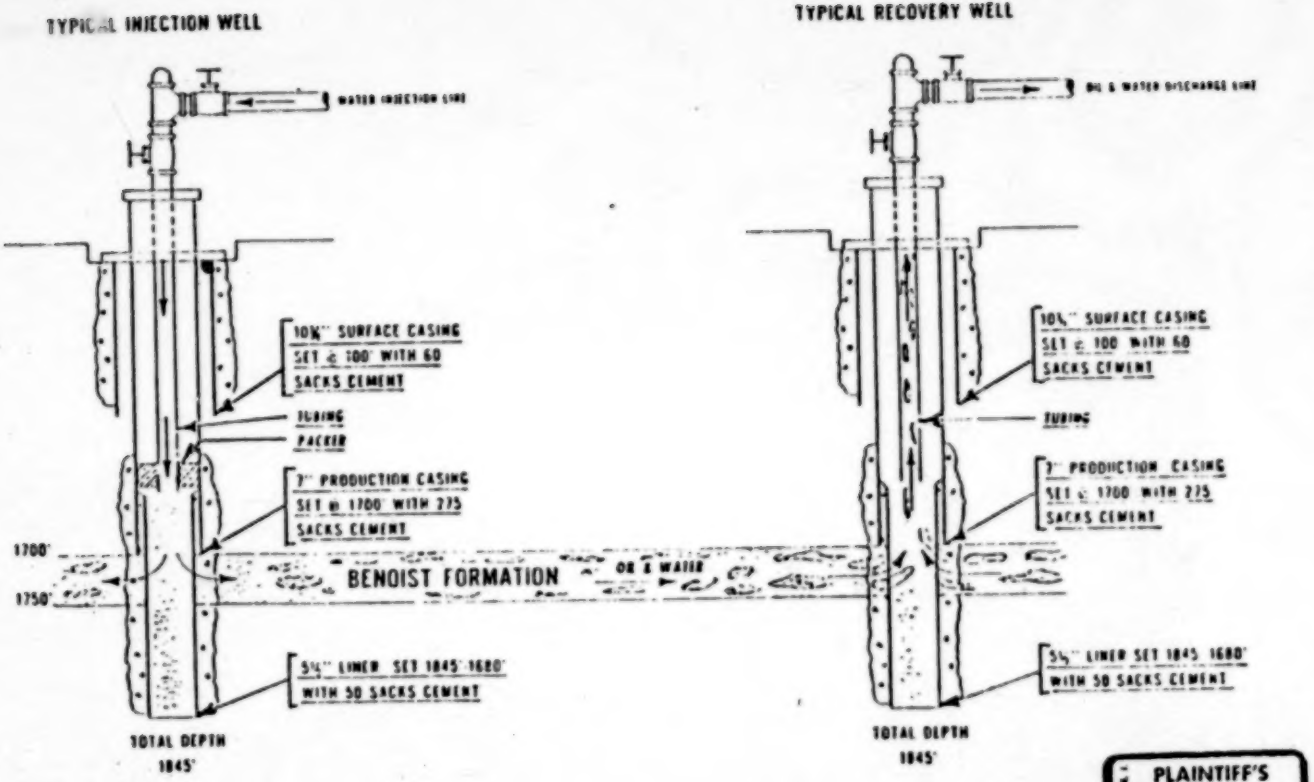
IT IS THEREFORE ORDERED AND ADJUDGED that Regulation 6 C.F.R. § 150.54(s), 38 Fed.Reg. 32484, and subsequent similar regulations, as interpreted by Ruling 1974-29 to exclude injection wells from the well count, are void and of no legal effect, and the Department of Energy is hereby enjoined from administrative use, application, implementation or enforcement of such regulation as interpreted by the Ruling, against each of the plaintiffs herein.

IT IS FURTHER ORDERED that the defendants' motion to supplement the record with two letters, is hereby granted.

IT IS FURTHER ORDERED that the defendants' motion to supplement answers to interrogatories is hereby denied, except as to M.D.L. cases which have yet to be tried, if any.

It has been the Court's firm view for some time that the importance of the issues in this case, the nature of the adversaries, and the simply tremendous sum of money dependent upon the final judgment in this M.D.L. litigation, would necessarily run the gamut of appellate processes. Upon this premise, and the premise that the fund is secure under the jurisdiction of this Court and the agreement of the parties, the Court will make no order at this time relative to distribution or disbursement of the trust fund, until the termination of this litigation.

SALEM UNIT



PLAINTIFF'S EXHIBIT 35

APPENDIX "A"

APPENDIX "B"

Q. Now, you testified yesterday, and I am sure it is the same today, that the stripper well regulation, which we have been talking about, is a joint venture between the CLC Energy Division and the Office of General Counsel CLC, is that correct?

A. You mean the writing of the regulation?

Q. That is correct.

A. Yes.

Q. All right. Now, as I understand it, what you have testified to this morning, and early this afternoon, you are telling this Court that you participated in the development, preparation, and issuance of that regulation, is that correct?

A. Yes.

Q. You are telling the Court because of your intimate involvement with Mr. Owens that you participated in the discussions which led up to the adoption of that regulation?

A. Yes. I recall being involved in discussions and actions, coordinating actions, which involved that regulation.

Q. Are you aware, Mr. Ware, that pursuant to court order the Department of Energy was ordered to file a document with this Court, and they did so in February of 1980, swearing under pain of perjury, that there were only nine persons involved in the development, preparation, and issuance of the stripper well regulation, and you weren't one of them?

MS. CRISMAN: Objection, your Honor. This is exactly one of the interrogatories that we intend to amend. And, your Honor, for reasons that your Honor has forced us to go find people who could testify at this trial, in the last several weeks, and we did so, and Mr. Ware is one of the people that came to our attention, and we talked to Mr. Ware, and we will amend our interrogatory with the appropriate response.

MR. BECK: Your Honor, they were served with interrogatories on December 26, 1978. After this Court ordered them to do so, they filed answers on February 20, I believe, of 1980. They had a year and two months to find out who was participating in the development, and who discussed the development, and who helped write the regulation. They came up with nine people, and this man wasn't one of them.

MS. CRISMAN: Excuse me, your Honor. I would like to correct Mr. Beck's harrangue. Our answers were filed in February of '79—not February of '80.

THE COURT: Well, this illustrates the problem that you have on those. And, I can see where you want to amend them. But, they had them, and they have relied on them, and up until this morning when you indicated that they were not accurate. You made a statement into the record, and that probably takes away the thrust of your question, Mr. Beck. (to Ware prior to Ms. Crisman's objection)

MR. BECK: My question:

Q. (By Mr. Beck) Were you aware of that?

A. No sir, I was not.

APPENDIX C

ENERGY RESERVES GROUP, INC.,
and Suburban Propane Gas
Corporation, Plaintiffs,

Marathan Oil Company and Sklar &
Phillips Oil Company, Intervening
Plaintiffs,

v.

FEDERAL ENERGY ADMINISTRATION
and John F. O'Leary, Administrator,
Federal Energy Administration, Defendants.

SIERRA PETROLEUM CO.,
INC., Plaintiff,

Maurice L. Brown Company,
Intervening Plaintiff,

v.

FEDERAL ENERGY ADMINISTRATION
and John F. O'Leary, Administrator,
Federal Energy Administration, defendants.

BRADEN-ZENITH, INC., Plaintiff,

v.

FEDERAL ENERGY ADMINISTRATION
and John F. O'Leary, Administrator,
Federal Energy Administration, Defendants.

Civ. A. Nos. 77-1146, 77-1087, 76-429-C6.

United States District Court,
D. Kansas

Jan. 26, 1978.

THEIS, District Judge.

The plaintiffs and interventors in this action are operators and owners of interests in properties capable of producing crude oil economically only by means of waterflood operations. Defendant Federal Energy Administration (FEA) is an agency of the United States, organized and existing under the provisions of the Federal Energy Administration Act of 1974, 15 U.S.C. § 761, et seq., and Executive Order No. 11790 (39 Fed.Reg. 2385, June 25, 1974). Defendant John O'Leary is named herein in his official capacity as Administrator of the FEA and references henceforth to FEA are intended to include both the FEA and its Administrator. Plaintiffs filed this action requesting declaratory judgment and injunctive relief invalidating a certain Ruling and Regulations of the FEA under which the FEA forbids counting of injection wells as wells for purposes of determining stripper lease status.

On May 26, 1977, a hearing on Motion for Preliminary Injunction in Civil Action No. 77-1146 was conducted before the Court and a preliminary injunction issued. These three cases were thereafter consolidated for the purpose of deciding three common issues:

1. Whether Ruling 1974-29 issued by the FEA on December 24, 1974, 39 Fed. Reg. 44414 is arbitrary, unreasonable or in conflict with its statutory authority.

2. Whether Rule 1974-29 was issued by the FEA in compliance with the Administrative Procedure Act, 5 U.S.C. § 553.

3. If Ruling 1974-29 is valid, whether the ruling may be applied to the plaintiffs' sales of crude oil prior to December 24, 1974, the date on which the ruling was issued.

All parties have filed Motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and hearing upon such motions was held to the Court. The parties agree there are no issues of material fact before the Court as to the questions outlined above, although defendant correctly asserts the Court cannot at this time determine any issue of

good or bad faith on the part of plaintiffs as related to the issue of retroactive enforcement. The statutory and regulatory history and other relevant undisputed facts as presented by the parties in briefs and argument before the Court are set out below.

FACTUAL BACKGROUND AND FINDINGS

Prior to November 16, 1973, a regulation issued by the Cost of Living Council (CLC) pursuant to the Economic Stabilization Act of 1970, placed a ceilingprice on the first sale of domestic crude petroleum.

On November 16, 1973, Congress enacted the Trans-Alaska Pipeline Authorization Act (TAPAA) which, inter alia, exempted from price controls the first sale of "crude oil . . . produced from any lease whose average daily production of such substances for the preceding calendar month does not exceed ten barrels per well . . ." P.L. 93-153, § 406(a), 87 Stat. 584, 590.

The Conference Report which accompanied TAPAA reads in part:

> Section 406, relating to stripper oil wells, as a Senate floor amendment to S.1081. The Conferees have adopted the general concept of the floor amendment, but have added new provisions to insure that the exemption is narrowly defined and prudently administered, and to insure that the incentive being granted is properly limited in accord with congressional intent.
>
> The purpose of exempting small stripper wells—wells whose average daily production does not exceed ten barrels per well—from the price restraints of the Economic Stabilization Act . . . and from any system of mandatory fuel allocation is to insure that direct or indirect price ceilings do not have the effect of resulting in any loss of domestic crude oil production from the premature shutdown of stripper wells for economic reasons.
>
> As of January 1, 1973, there were 350,000 stripper wells producing ten barrels a day or less. Stripper wells account for 71 percent of all of the oil wells in this country, but

> produce an average of only 3.6 barrels per day, or only 13 percent of total U.S. domestic crude production.
>
> Many stripper wells are of only marginal economic value. When the costs of their operation exceed the value of their production, they are shut in, and a known and developed crude oil reserve is lost to U.S. production. Removing Phase IV price restraints from these marginal stripper wells has the effect of increasing the value of the crude oil they produce by about $1.30 per barrel. . . . This price incentive will encourage owners and operators of stripper wells to maintain production and to keep these wells in operation for longer periods of time than would be possible if the value of their crude oil production were determined under Phase IV price ceilings. This increased incentive will, it is anticipated, permit stripper well operators to make new investments in the eligible wells and improve the gathering and other facilities for moving this oil to market. 2 U.S. Cong. & Admin. News, pp. 2531-32 (1973).

The provisions added by the Conference Committee to insure the exemption is narrowly defined include on-site inspections and use of State data to prevent "gerrymandering" of leases. The Committee added:

> The *sole* purpose and objective of this Section 406 is to keep stripper wells—those producing less than ten barrels per day—in production and to insure that the crude oil they produce continues to be available for U.S. refineries and U.S. consumers. (Id. at 2532.)

On November 26, 1973, the CLC published regulations exempting from price controls the first sale of domestic crude petroleum and petroleum condensates produced from any "stripper well." 6 C.F.R. § 150.54(s). The CLC also issued regulations defining "stripper well lease," 6 C.F.R. § 150.54(s)(2), and the statutory term "average daily production." 6 C.F.R. § 150.54(s)(2).

On November 27, 1973, Congress enacted the Emergency Petroleum Allocation Act (EPAA) requiring the President to promulgate regulations providing for, inter alia, pricing of crude oil not later than fifteen days after the date of enactment.

Section 4(e)(2)(A) of the EPAA preempted the counterpart provision in the TAPAA, and provided:

> The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well. 15 U.S.C. § 753(e)(2)(A) (1973).

On December 6, 1973, by Executive Order 11748 (38 Fed. Reg. 33575), the President created the Federal Energy Office (FEO) and delegated to it his authority under the EPAA.

On December 14, 1973, the CLC published a stripper well lease exemption amended to conform to the EPAA statutory terms. The new definition of stripper well lease was set out as follows:

> A "property" whose average daily production of crude petroleum and petroleum condensates, including natural gas liquids, per well did not exceed 10 barrels per day during the preceding calendar year. 6 C.F.R. § 150.54(s)(2).

The amended regulatory definition of the statutory term "average daily production" was set out as follows:

> The qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of calendar days in that year times the number of wells which produced crude petroleum and petroleum condensates, including natural gas liquids, from that property in that year.
>
> To qualify as a maximum total production each well on the property must have been maintained at the maximum feasible rate of production, in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production. 6 C.F.R. § 150.54(s)(2).

On December 26, 1973, the CLC delegated its petroleum pricing authority to the FEO and on January 14, 1974, FEO

adopted and reissued the CLC definitions of "stripper well lease" and "average daily production." 10 C.F.R. § 210.32(b).

On June 27, 1974, pursuant to the FEA Act and Executive Order No. 11790, authority with respect to price controls on crude oil was transferred to the FEA. The regulations set forth and discussed in preceding paragraphs remained in effect as regulations of the FEA.

On December 19, 1974, the FEA issued Ruling 1974-29, 30 Fed.Reg. 44414, relevant portions of which are set out below:

> *Issue:* Is an "injection" well a "well" for the purpose of determining whether the average daily production of a property was 10 barrels or less per well in the preceding calendar year, for purposes of the stripper well lease exemption of 10 C.F.R. § 210.32?
>
> *Ruling:* No. Under the FEA regulations, the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease is exempt from the mandatory price and allocation regulations. A stripper well lease is defined as a property whose average daily production did not exceed 10 barrels per day per well during the preceding calendar year. "Average daily production" is further defined in 10 C.F.R. § 210.32(b) as:
>
> > The qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of days in that year times the number of wells which produced crude petroleum and petroleum condensates, including natural gas liquids from that property in that year.
>
> Thus, the FEA regulations by their specific language provide that only wells "which produce crude petroleum" are to be counted in calculating average daily production for the purpose of determining whether the stripper well lease exemption applies. While injection techniques help to "produce" crude petroleum, they are not wells which themselves "produce" crude petroleum. Therefore, wells which did not actually yield or produce crude petroleum

> during the preceding calendar year are not production wells for this purpose. Whether the nonproducing well was an "injection" well, a disposal well, a dry well, a spent well, or a shut-in well will not change this result.

Ruling 1974-29 was issued by FEA General Counsel without prior notice or opportunity for comment by oil producers, and is based solely upon general counsel's understanding of specific language in FEA regulation at 10 C.F.R. § 210.32(b).

During early 1975, the FEA determined the stripper well lease definition contained in 10 C.F.R. § 210.32(b) discouraged increased production from marginally producing wells:

> Because the current regulation affords an exemption only in the year following a calendar year in which production from the lease was at or below the statutory stripper well level of ten barrels or less per well per day, there exists no incentive for producers to increase production levels above the ten barrel per well per day limit either through work-overs or enhanced recovery techniques, because such increased per-well production for a calendar year would then result in a loss of the stripper well lease exemption in the following year.
>
> . . . . .
>
> [I]f continued, the regulation would have the effect of seriously discouraging the implementation of enhanced recovery techniques on marginally-producing properties that are now subject to primary production techniques. (40 F.R. 22123, May 21, 1975.)

Accordingly, following notice of rulemaking and a public hearing, FEA adopted an amendment to the regulations which redefined stripper well lease as:

> A "property" whose average daily production of crude oil, including condensates, per well did not exceed 10 barrels per day during any preceding calendar year beginning after December 31, 1972. 10 C.F.R. § 210.32(b).

On December 22, 1975, Congress enacted the Energy Policy and Conservation Act (EPCA), P.L. 94-163, 42 U.S.C. § 6201,

et seq., 15 U.S.C. § 753, et seq., which, inter alia, repealed the exemption from price controls for stripper well production. Pursuant to authority contained in the EPCA, the FEA included stripper well production in the upper tier pricing rule at 10 C.F.R. § 212.74, 41 Fed.Reg. 4931 (Feb. 3, 1976).

On August 14, 1976, Congress enacted the Energy Conservation and Production Act (ECPA), P.L. 94-385, 42 U.S.C. § 6801 (note) and 15 U.S.C. § 761 (note). Section 121 of the ECPA amended Section 8 of the EPAA by adding subsection (i), which reads in pertinent part as follows:

> Section 8(i)(1). The first sale price of stripper well crude oil shall be exempt from the regulation promulgated under section 4 of this Act [price controls] as amended pursuant to the requirements of this section. . . .
>
> (2) For the purposes of this subsection "stripper well crude oil" means crude oil produced and sold from a property whose maximum average daily production of crude oil well during any consecutive 12-month period beginning after December 31, 1972, does not exceed 10 barrels.
>
> (3) To qualify for the exemption under this subsection, a property must be producing crude oil at the maximum feasible rate throughout the 12-month qualifying period and in accordance with recognized conservation practices.
>
> (4) The President may define terms used in this subsection consistent with the purposes thereof.
>
> 15 U.S.C. § 757(i)(1), (2), (3) and (4).

The Conference Report accompanying the ECPA provision above, stated:

> Prior to the enactment of EPCA, stripper well production was free from federal crude oil price controls. The resulting imposition of price ceilings upon stripper well production has increased the administrative and compliance burdens associated with the implementation of EPCA. Imposition of federal price ceilings on stripper well operators—largely small and independent producers—has required them to comply with federal regulations, adding to the cost and administrative difficulties of operating these already marginal wells. These administrative,

> enforcement and compliance burdens may be unnecessary because, while 70 percent of all domestic wells are stripper, stripper well production accounts for only 12-15 percent of actual production. In addition, stripper well production is already priced at the upper tier. The conferees believe that exemption of stripper well production from price ceiling is desirable to reduce the burdens and costs imposed upon stripper well operators, as well as the administrative and compliance costs associated with implementation of EPCA. Equally importantly, the price increases permitted by such an exemption are likely to permit continued operation of marginally profitable stripper wells beyond the period which would be possible at current price levels. 3 U.S.Cong. & Admin.News, p. 2034 (1976).

On November 3, 1976, after public hearing and consideration of written comments, the FEA adopted without comment a regulation concerning stripper well exemption at 10 C.F.R. § 212.54, and a definition of "average daily production" virtually identical in pertinent parts to prior regulations issued in conjunction with TAPAA and EPAA. The FEA presently contends Ruling 1974-29 is applicable to determinations of the stripper well exemptions under TAPAA, EPAA and the EPCA.

Crude oil production is historically regulated by State bodies having as a primary purpose the elimination of waste in the production of oil and gas and the promulgation and enforcement of rules and regulations which result in conservation of oil and gas.

State regulatory agencies have treated injection wells as producing wells in calculating allowables, i.e., production quotas per well in pooled or unitized properties. The Oil Conservation Commission of the State of New Mexico specifically sanctioned the transfer of allowables from injection wells to recovery wells on one of the properties involved in the action. The Commissioner of Conservation for the State of Louisiana has also permitted the counting of injection wells to calculate allowables for poolwide units. The Railroad Commission of

Texas has likewise permitted transfer of allowables from injection wells to recovery wells, has required counting of injection wells on well status reports filed with the Commission, and has permitted the counting of injection wells in the counting of wells for allowable purposes.

The Mineral Land Leasing Act of 1920 (MLLA), 30 U.S.C. § 181, et seq., authorized the execution of oil and gas leases by the Secretary of the Interior on federal lands at royalties to be determined by the Secretary on competitive bidding, and further provided the Secretary could reduce the royalty when the average daily production of any oil well did not exceed ten barrels per day. The Act was later modified to allow for the Secretary's approval and still later his requirement of cooperative or unit plans of development. In 1936 the Department of Interior regulations were amended to comply with such changes. In these regulations, the Secretary found input or injection wells to be commercially productive wells for purposes of calculating average daily production of a lease. Since 1936, the Secretary of the Interior has consistently included injection wells in a well count for purposes of determining "average daily production of any oil well," as set out in the statute. See 30 C.F.R. § 221.49.

During World War II, in order to provide additional incentive for marginal stripper well and repressuring operations, the Office of Economic Stabilization allowed a specified increased price in all pools producing less than nine barrels daily per well. 9 Fed.Reg. 7765 (1944). In applying this regulation, entitled "stripper well compensatory adjustment," the Price Administrator calculated "daily average per well production" by including both recovery and injection wells.

As oil is produced from a field under primary production, natural reservoir energy and pumping units are sufficient for economical production of oil. As oil is depleted, pressure lessens and lesser amounts of oil are forced to the surface. The economic limit for primary production is reached when revenues from oil produced equal the costs of production. At that

time the operation will either shut down or go into a form of secondary recovery. One of the most common secondary recovery methods is use of injection wells in a waterflood operation.

All of the properties involved herein use wells through which water is injected into the producing geological formation for the purpose of creating water pressure in the formation, thereby driving the remaining crude oil to other wells from which the oil is recovered. Physically, the injected water displaces oil in the formation and supplies the necessary energy to move the oil to the well bore. Economically, without the use of waterflooding the field would reach its economic limit, be plugged and abandoned prematurely, still leaving in the ground up to 80% of the otherwise recoverable oil.

All of the properties involved herein would qualify for the stripper well exemption from price regulation if injection wells were counted in determining the average daily production from the leases. None qualify if injection wells are not counted. No contention is made that injection wells on the properties here involved were not necessary on either sound geological bases or oil industry standards.

FEA Regional Offices are now conducting investigations of plaintiffs Energy Reserves Group, Inc., Suburban Propane Gas Corporation, and Sierra Petroleum Company, Inc. practices in connection with crude oil production from various properties. The agency has issued a Remedial Order, April 23, 1977, with respect to one of Suburban's properties following issuance on November 22, 1975, of Notice of Probable Violation (NOPV) to Suburban, three written replies by Suburban, and a conference. In the Remedial Order, FEA found Suburban had violated applicable regulations by treating production of the property as exempt from controls pursuant to the stripper well lease exemption and that such violations had resulted in overcharges of $451,807.74. Accordingly, the Remedial Order required Suburban to refund within 120 days from the effective date of the Order the described sum, plus

interest, to its purchaser. Suburban's appeal from the Remedial Order, together with an application for stay, are pending.

On November 29, 1976, the FEA issued a NOPV to plaintiff Marathon, alleging it had erroneously classified its Grass Creek Unit as a stripper well lease by including injection wells in its well count. The NOPV states the inclusion of injection wells is erroneous under FEA Ruling 1974-29. The NOPV concludes that during the period from December 1, 1973 to May 31, 1975, Marathon made overcharges of $2,842,715.00 in sales of approximately 495,992 barrels of crude oil produced from the Grass Creek property.

On December 17, 1976, the FEA issued a Remedial Order to Sklar and Phillips Oil Company finding, inter alia, that oil produced from various leases operated by Sklar did not qualify for stripper well treatment because of the inclusion of injection wells in the computation of eligibility. The Remedial Order provided Sklar must refund $303,038.00, plus interest, to its purchaser. On February 4, 1977, Skar filed an appeal from the Remedial Order. Hearing was held on April 18, 1977, and on August 2, 1977, the FEA issued an order denying Sklar's appeal as to the issues relevant herein.

WAS RULING 1974-29 INTERPRETATIVE OR SUBSTANTIVE, AND PROPERLY PROMULGATED UNDER THE ADMINISTRATIVE PROCEDURE ACT?

The Court will first consider whether FEA Ruling 1974-29 is interpretative or substantive in nature. Such determination is necessary in order to ascertain whether Ruling 1974-29 was enacted with proper legal procedures and the extent of judicial review as to the merits of the ruling. Plaintiffs assert the ruling is substantive and therefore void because notice and opportunity for comment were not provided. Plaintiffs further contend if the ruling is found to be interpretative, then the Court has extensive powers to review and overrule the merits of the ruling. Defendant asserts the ruling is merely interpretative, but is nevertheless entitled to "great deference" as an agency's interpretation of its own regulation.

In enacting the EPAA, Congress conferred upon the President the power to promulgate substantive regulations providing for the mandatory allocation and pricing of, inter alia, crude oil. On December 4, 1973, the President, by Executive Order, established the FEO and delegated to it all authority vested in the President by the EPAA. On June 27, 1974, the FEA Act of 1974 established the FEA. That same day, Executive Order No. 11790 abolished the FEO and transferred all powers and functions of the FEO to the FEA. Therefore, the FEA has legal authority to promulgate substantive rules or regulations pursuant to the EPAA as amended. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 410-411, 50 L.Ed.2d 343 (1976).

Although the FEA has authority to issue guidelines having the force and effect of law, this does not mean every regulation promulgated by the FEA is substantive. "That agency activity falls within the permissible scope of statutory authority does not alone answer the question of the applicability of Section 4" [of the Administrative Procedure Act]. *National Motor Freight Traffic Association* v. *United States*, 268 F. Supp. 90 (D.D.C. 1967). The label attached to a ruling by the enacting agency, the procedures utilized to promulgate it, and the practical effect given such ruling in further agency proceedings relevant thereto, are all factors indicative of whether a rule is interpretative or substantive. If the FEA intends a rule to be substantive, it is required to label it as such and utilize APA notice and comment procedures necessary to render the final guideline legally effective. See 15 U.S.C. § 757(i)(1). A substantive guideline promulgated without resort to such procedures is invalid.

In its briefs before the Court the FEA labels Ruling 1974-29 as merely interpretative of its own prior regulation, and claims it is therefore not required to be promulgated pursuant to notice and comment. Defendant's brief of May 23, 1977, states at page 14:

> Rulings are issued by the agency in its discretion whenever there have been a number of inquiries regarding a

> particular section of the regulations or when the General Counsel determines it will assist the public in applying the regulation to a specific situation. 10 C.F.R. § 205.151. Objections to a ruling may be filed with the General Counsel. 10 C.F.R. § 205.153.

In issuing Ruling 1974-29, defendant states FEA General Counsel placed sole reliance upon his interpretation of the phrase "wells which produced crude petroleum" in the regulation defining the statutory term "average daily production." There is no regulation defining the word "well" as used in the statute, although the effect of Ruling 1974-29 is to define the statutory term as excluding injection wells. It does not appear that FEA General Counsel, in analyzing the phrase "wells which produced crude petroleum," considered the effect of his ruling upon the statutory term "well," nor does he appear to have considered legislative intent or prior legislative treatment of stripper leases in other contexts, nor did he consider industry understanding of the term "well" as applied to stripper well leases.

The above method of promulgating Ruling 1974-29 was legally sufficient for its validity as an interpretative ruling if such was the actual effect given it by the FEA. However, a Court's decision as to whether a rule is actually substantive or interpretative must also be based upon the substantive effect of the agency's action, and not merely on the label or designation chosen by the agency. *Nader* v. *Butterfield*, 373 F. Supp. 1175 (D.D.C.1974). The problem with the FEA's label and method of promulgating Ruling 1974-29 develops when the Court considers the actual effect given the ruling by the FEA in subsequent proceedings.

If an agency properly enacts a substantive rule, the rule has the following legal effect:

> [A substantive rule] establishes a standard of conduct which has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in this par-

> ticular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency. *Pacific Gas & Electric Co.* v. *Federal Power Commission*, 164 U.S.App.D.C. 371, 376, 506 F.2d 33, 38 (1974).

An interpretative rule cannot be treated by the agency as having in itself the force of law. Rather, it has the effect described below for a general statement of policy:

> When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy. Id.

Courts, considering whether agency orders enacted without notice and opportunity for comment are actually utilized by the agency as substantive or interpretative, have looked to the language of the order itself, and to the language of any subsequent proceedings concerning the subject matter of the order. Where the order is phrased as a guide to the agency's present views, subject to change, and with no suggestion these views have the finality or force of substantive regulations, as in *National Association of Insurance Agents* v. *Board of Governors of Federal Reserve System*, 160 U.S.App.D.C. 144, 489 F.2d 1268 (1974); or where the order has no immediate inflexible impact and is specifically left open to discussion, as in *Pacific Gas & Electric Co.* v. *Federal Power Commission*, 164 U.S.App.D.C. 371, 376, 506 F.2d 33, 38 (1974), such agency orders are deemed to be interpretative. Ruling 1974-29, previously quoted, is clearly phrased in terms of a final agency opinion not open to further discussion or presentation of evidence by affected members of the regulated industry.

Further persuasive evidence of an agency order's interpretative status is present where the administrative agency, in subsequent rulings involving the subject matter of the order, does not cite the order as having legal force in itself but rather rules upon the merits of the subject matter directly

citing the statute interpreted by the order. *Pesikoff* v. *Secretary of Labor*, 163 U.S.App.D.C. 197, 501 F.2d 757 (1974). The "Board decision on review should be firmly grounded upon substantial and extensive record evidence and the Board should not attempt to apply the policy statement . . . as a rule of law." *Pacific Gas & Electric Co.* v. *Federal Power Commission*, supra, 164 U.S.App.D.C. at 377, 506 F.2d at 39.

A Remedial Order issued to a party whom the FEA has found to be in noncompliance with FEA regulations is required to "include a written opinion setting forth the relevant facts and legal basis" for the order. 10 C.F.R. § 205.192(a). The Remedial Order issued to Suburban Propane by the FEA on April 25, 1977, states in part:

> II. (A) As a corollary to Argument II immediately above, SUBURBAN suggests that FEA Ruling 1974-29 was in fact a new rule or regulation which the FEA General Counsel could not rightfully promulgate. SUBURBAN claims that Ruling 1974-29 "established the first definition of a well for purposes of the stripper well exemption."
>
> While the arguments SUBURBAN makes are made with great energy, and SUBURBAN no doubt believes the same to be right and logical, these arguments must be rejected by FEA.
>
> In Ruling 1974-29, FEA stated that under FEA regulations (and not due to any "interpretation" by the General Counsel) a stripper well property must be defined in terms of "*the number of wells which produce* crude petroleum and petroleum condensates." [Reference 10 C.F.R. Sec. 210.32(b).] Indeed, the emphasis above was supplied in the Ruling, not by this Remedial Order. It was pointed out that "wells which did not actually yield or produce crude petroleum during the preceding calendar year are not production wells" for the purpose of determining a stripper well property. (citation deleted.) This was a "ruling" not an "interpretation" and thus, merely stated what the pertinent regulations had always meant. SUBURBAN has misinterpreted the regulations and its arguments on the point must be rejected by FEA.
>
> III. (B) SUBURBAN next indicates that Ruling 1974-29 is erroneous and is inconsistent with Congressional intent and FEA Ruling 1974-28.

> Clearly, if FEA believed Ruling 1974-29 to be inconsistent with the law as passed by the Congress, the FEA would not have issued Ruling 1974-29. FEA rejects this argument by SUBURBAN basically for the reason that FEA was, by Ruling 1974-29 correctly stating the meaning of the regulations (see FEA Answer II(A) above).

To Suburban's assertions that Ruling 1974-29 contradicts applicable state and industry standards, the FEA replied at page 15 of the Order:

> FEA has consistently taken the position that it will not allow any state authority to dictate to FEA what the regulations are or what they mean. Likewise this applies to regulations promulgated by other federal agencies. To accept state interpretation of federal law would be to make a mockery of the "Supremacy Clause" of the United States Constitution, and to allow other federal regulations to be used in the interpretation of FEA regulations would be to contravene Section 8 of the Emergency Petroleum Allocation Act under which the FEA is given the authority, subject to the laws of the Congress, to regulate oil prices. Thus, FEA regulations cannot be subject to contradiction by the regulations of other federal agencies.
>
> SUBURBAN is surely aware that different laws and regulations are enacted for different purposes. To allow FEA regulations to be interpreted according to regulations which have nothing to do with the regulation of oil prices [FEA's function] would most certainly produce results which would be violative of Congressional intent and federal law.

In its Remedial Order against Sklar-Phillips Oil Company, issued December 17, 1976, the FEA states in part:

> 1. Texas law does not govern the application of a federal price control program. The fact that Texas considers an injection well with transferred allowables to be a producing well, if it does, has no bearing on how the term "producing well" is defined by federal regulatory law. Ruling 1974-28 (sic) clearly states that the FEA considers injection wells to be "nonproducing" wells,
>
> > "While injection techniques help to 'produce' crude petroleum, they are not wells which themselves 'produce' crude petroleum."

2. Again, Ruling 1974-28 (sic) clearly excludes injection wells from the term "producing well." A "producing well" is one "which produces crude petroleum." The word "yield" is used synonymously with the word "produce" in the Ruling and is so considered in English dictionary usage. Therefore, no distinction exists between the two words and nothing short of production was contemplated with the use of the word "yield."

3. FEA rulings are not legislation of new law, rule-makings, interpretations or exceptions. They are merely clarifications of what the law has always been. Like the regulations themselves, they are published as a guide to aid the industry in applying the law, specifically, in this case, the Emergency Petroleum Allocation Act.

Thus, by their very nature, they are internally consistent, not inconsistent as Sklar maintains, and in line with the policy objectives of Congress.

Finally, the Decision and Order of the FEA on the appeal of Sklar-Phillips from the above Remedial Order, issued August 2, 1977, quotes the purpose of the stripper well exemption as being "to ensure that direct or indirect price ceilings do not have the effect of resulting in the loss of any domestic crude oil production or the premature shutdown of stripper wells for economic reasons." 19 Cong. Rec.S. 13452 (daily ed. July 14, 1973). The FEA also cited Congress' intention that the exemption be strictly enforced so as to prevent altering of normal patterns of operations, such as "gerrymandering" to achieve a benefit not otherwise available. The Order then states at page 7:

In Ruling 1974-29, the FEA simply clarified the meaning of producing wells in light of the underlying Congressional intent. The Ruling did not involve any policy or regulatory changes by the FEA but served merely as a formal notification of the interpretation that the FEA has always placed on the regulations implementing the stripper well exemption. Therefore, since Ruling 1974-29 simply clarified the terms and intent of the underlying regulations, it was not the type of rule-making proceeding to which the formal requirements of the APA would apply. Moreover, since the interpretation of the method of computing the

> number of producing wells on a property rests securely on the objectives which the Congress expressed in the initial piece of legislation which referred to the stripper well property exemption, there is no basis for Sklar's allegation that the Ruling involves a retroactive modification of preexisting requirements. (citation omitted.)

All of the above-cited Orders of the FEA rely upon Ruling 1974-29 as legal authority for enforcement action. Although superficially touching upon very real questions of congressional intent, the FEA does not analyze such intent upon the basis of federal and state regulations treating injection wells as producing wells for related purposes at the time the statute was enacted, or upon the basis of industry understanding of the term "wells", or "wells which produce" as related to stripper well leases. "When Congress has used technical words or terms of art, it is proper to explain them by reference to the art or science to which they are appropriate." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974). Neither does the FEA consider the actual impact of allowing or refusing to allow injection wells to be counted for purposes of calculating stripper lease status as related to the congressional purpose of encouraging stripper lease operators to keep wells in operation for longer periods of time and encourage them to make new investments in eligible wells. See TAPAA Conference Report, supra. The FEA's statement, namely, "Clearly if the FEA believed Ruling 1974-29 to be inconsistent with the law as passed by Congress, the FEA would not have issued Ruling 1974-29," patently reflects the agency's attitude that Ruling 1974-29 is legal authority in itself, the factual and legal basis for which will not be reconsidered. Such is not a Board decision "firmly grounded upon substantial and extensive record evidence," but rather, it is clear the agency is attempting to apply the Ruling as a rule of law. *Pacific Gas & Electric Co.* v. *Federal Power Commission*, supra, 164 U.S.App.D.C. at 377, 506 F.2d at 39.

A final important consideration in determining whether a rule is interpretative or substantive in nature is the extent of its impact upon the regulated industry. If a rule or order, no

matter how labeled by the agency, has an immediate and significant impact upon a regulated industry or an important class of members of products of that industry prior to a chance for a full hearing upon the merits of the policy espoused in the rule, then notice and an opportunity for comment are required. *Pacific Gas & Electric Co.* v. *Federal Power Commission*, supra; *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478 (2nd Cir. 1972); *Texaco* v. *Federal Power Commission*, 412 F.2d 740 (3rd Cir. 1969); *Pharmaceutical Manufacturers Assoc.* v. *Finch*, 307 F. Supp. 858, 863 (D.Del. 1970); *National Motor Freight Traffic Association* v. *United States*, 268 F. Supp. 90 (D.D.C.1967).

Legislative intent that APA provisions, or at least some minimal form of notice and opportunity to comment is required before the FEA promulgates rulings having substantial impact upon the regulated industry, is clearly set out in House and Senate reports emerging from the Energy Act Conference Committee, as follows:

> The subsection [7(i)(1) and (3)] applies, with modifications, Administrative Procedure Act provisions not only to rules and regulations, but also to orders similar to a rule or regulation. This reflects the conferees' intent that the Administrator should provide notice and opportunity for comment whenever his proposed action could have an impact on more than the few persons who, in the absence of such public notice, would be likely anyway to receive personal notice of the proper action. It is expected that the exception to the notice provision in paragraph (B) of section 7(i) of the conference substitute will be used sparingly. . . . The conferees intend that if the Administrator is in doubt about the applicability of any of the standards provided in this section, he will resolve the doubt in favor of the fullest application of procedural safeguards. 120 Cong. Rec.H. 3088 (April 23, 1974).

Plaintiffs assert and defendant does not dispute the properties involved herein would not be producing crude oil were it not for the use of injection wells because of economic and physical realities of oil production. Plaintiffs also assert injection wells cost as much to maintain as do other producing wells.

The purpose of exempting small stripper wells from the price restraints of the Energy Acts is to insure that direct or indirect price ceilings do not result in loss of domestic crude oil production from the premature shutdown of stripper wells for economic reasons. 2 U.S.Cong. & Admin.News, pp. 2531-32(1973). If the costs for maintaining an injection well are similar to those for maintenance of a producing well, and the producing well would not produce were it not for the injection well, then the economic limit of a lease involving injection wells is substantially affected by whether or not injection wells can be calculated for determination of stripper status.

A further substantial effect upon producers such as plaintiffs herein results from FEA regulations requiring operators to certify to the purchaser of oil that the property from which the oil is produced qualifies for the stripper exemption. 10 C.F.R. 212.131(a)(1). The erroneous certification of a property as a stripper well property constitutes a violation, 10 C.F.R. 205.202, and is punishable by a civil penalty, 10 C.F.R. 205.203(b), or even imprisonment and fine, 10 C.F.R. 205.203(c). Producers who until Ruling 1974-29, certified their properties as "stripper," based upon consistent prior governmental and industry understanding of injection wells as "producing" for stripper lease or allowable purposes, suddenly found themselves liable for reimbursement of large sums to purchasers and possible civil fines. Such potential enforcement sanction has a substantial effect upon the economic planning of the producer, as well as upon decisions as to whether or not to maintain production from these same leases. Without being afforded a hearing upon the merits of Ruling 1974-29, plaintiffs clearly face a dilemma of double risk portent, whether to certify leases they believe they are statutorily entitled to certify as "stripper" and thereby risk FEA prosecution, or whether to forbear certification and permanently lose the opportunity to receive the higher price for their oil if it is economically feasible for production to continue. See *Phillips Petroleum Co.* v. *FEA*, 435 F. Supp. 1239 (D.D.C.1977).

Upon the basis of the substantive effect given Ruling 1974-29 in subsequent proceedings before the FEA, and the substantial effect it has upon plaintiffs prior to any chance for presentation of evidence or hearing upon the merits of the ruling, the Court finds Ruling 1974-29 to be a substantive rather than an interpretative order. Because Ruling 1974-29 was promulgated by the FEA without notice or opportunity for comment, it is void and ineffective to affect the rights of plaintiffs herein. See *Morton* v. *Ruiz*, 415 U.S. 199, 39 L.Ed.2d 270, 94 S.Ct. 1055 (1974).

Plaintiffs have raised significant questions in these proceedings as to whether Ruling 1974-29, even if it were legally promulgated, is consistent with the purposes of the stripper lease exemption of the Energy Act. See 15 U.S.C. § 757(h), (i). It appears to the Court that by promulgation of Ruling 1974-29, the FEA has effectively defined the statutory term "well," as 15 U.S.C. § 757(h), (i) empowers the President, and therefore the FEA, to do so. In doing this without hearings as to the actual effect of such definition upon the congressional purpose of encouraging continued production from marginal leases, and without consideration of any legal or industry precedent indicating whether or not such definition was within congressional intent as to wells to be counted in determining stripper lease status, the FEA has shirked its duty to fully inform itself of important implications prior to enacting such substantial regulation.

It is usual and sound judicial policy to proceed no further in a case as to the issues of fact and law raised by the parties than is necessary for decision. In other words, where decision is apparent and effective on one issue, often equally important justiciable issues are not reached. The Court chooses to follow such a judicial precept here. However, the Court feels he would be remiss if at least some comment is not directed to some legal points raised by both the able government and oil industry counsel.

Overall, the Court has been impressed with the thoroughness, accuracy and logic of the plaintiffs' consolidated brief,

and in particular with the supplemental brief of plaintiff Marathon Oil. The FEA position, while correct in stating many broad governmental postulates of statutory interpretation and the "sanctity" of administrative expertise, seems to indicate less than the wide grasp one would expect such an agency to have of the basics of the oil and gas industry and relation thereof to past governmental practice in legislative, administrative and judicial concepts. While in this decision the Court has reluctantly refrained from upholding plaintiffs' persuasively briefed position that the FEA exceeded its statutory authority under the basic congressional enactments of TAPAA and EPAA in reaching the administrative position reflected by Ruling 1974-29, it does seem abundantly clear to the Court that the following phrasing or paraphrasing of the plaintiffs' argument has either been misconstrued or minimized by defendants as representatives of the sovereignty of government:

> The most salient facts in the background of the case are: (1) that at the time of enactment of the TAPAA and the EPAA in 1973, a cabinet agency of the federal government, the United States Department of the Interior, had for four decades consistently and unequivocally ruled that injection wells should be counted; (2) that this view was also held by some state regulatory agencies, in major oil producing states, and the petroleum industry generally; (3) that when the Congress chose in 1973 to provide an exemption from price and allocation controls for stripper wells, Congress chose to define that exemption by *the very phrase* (i.e., "average daily production," per well) *coined and used by the Interior Department's regulations* pursuant to which injection wells had been treated as producing wells for forty years; and (4) that the legislative history of the stripper exemptions shows that its sponsor assumed that injection wells would be counted in determining the average daily production per well of producing properties. Moreover, it is also beyond dispute that the Interior Department's reasons for permitting the counting of injection wells and the Congress' purpose in exempting stripper well production from price controls are the same—to encourage the continuation and enhancement of crude oil production from marginal properties where production efforts are much more costly. The Cost

> of Living Council's (CLC) regulations implementing the EPAA also clearly referred to the Interior Department's phrase embodying that Department's longstanding position. Although the CLC originally promulgated the regulations implementing the stripper well lease exemption of both the TAPAA and the EPAA, the Federal Energy Office and the FEA both adopted the CLC regulations without substantial change and, like the CLC, without first giving notice of proposed rulemaking of their intent to adopt those regulations.

It is additionally persuasive that our Tenth Circuit in *Marathon Oil Co.* v. *Kleppe*, 556 F.2d 982 (decided June 7, 1977), judicially affirms the historic purpose and use of the Department of Interior regulations on injection wells:

> The use of water injection wells is a conservation measure designed to get maximum production from the oil producing wells in a given participating area. Both parties agree that water injection wells are permitted to be counted as oil producing wells, in determining the average daily production per well, in order to encourage lessee to drill as many injection wells as will efficiently contribute to increased production.

One of the difficulties of FEA officials seems to be a failure to grasp the overwhelming use of waterflooding techniques in stripper well production. Again, one of the weaknesses of the government's overall position is best illustrated by reproducing Footnote 10 of Marathon's Supplemental Brief at pp. 18-19:

> The government has previously argued that the stripper exemption should be construed narrowly and, in support of this contention, has cited language from the Conference Report accompanying the TAPAA which stated that Congress intended to prevent the "gerrymandering" of leases. It is clear, however, that Congress was not there concerned with a narrow construction of the statutory term "well." Rather, it was concerned with a narrow construction of the statutory term "lease." In order to prohibit the gerrymandering of leases to average down high and low production leases, the CLC narrowly defined the word "property" in its regulations implementing the TAPAA

and EPAA and stated as its reason for doing so the following:

> For purposes of this exemption, the term "property" is described as being co-extensive with that "property" used to determine 1972 base production control levels, as measured by leases in existence in 1972. *This narrow definition was adopted in order to comply with the Congressional intent expressed in the Conference Report which stated that the Congress specifically intends that the regulations shall, among other things, prevent any "gerrymandering" of leases* to average down high production wells with a number of low production stripper wells to remove the high production wells from price ceilings. (H.R.Rep.No. 93-624.) 38 Fed. Reg. at 32495. (Emphasis added.)

Thus, it is clear that the definition of "average daily production" which Ruling 1974-29 purports to interpret is totally unrelated to the prevention of the so-called gerrymandering of leases. There is simply no evidence that Congress intended the definition of "well" in the TAPAA and EPAA stripper well exemptions to be narrowly construed. The legislative history, moreover, indicates precisely the opposite.

Finally, the anomaly of governmental action is shown by FEA's position on one unit of the leases involved in this litigation. We quote from pp. 19-20 of Marathon's Supplemental Brief:

> Marathon has intervened in this litigation because Marathon received a Notice of Probable Violation (NOPV) from the FEA which alleged that it had illegally counted injection wells in determining the average daily production per well from its Grass Creek Frontier Unit in Wyoming (the Grass Creek Unit). The FEA has alleged that crude oil has been sold at prices $2.8 million in excess of the prices which could have been charged had production from the Grass Creek Unit not been sold as stripper crude. At the time Marathon determined that average daily production per well from the Grass Creek Unit should be determined by counting injection wells, it was operating that unit under regulations promulgated by the Department of Interior. As operator of the unit, Marathon was required to pay royalties to the Department of Interior

> based on the average daily production from the unit. Under the governing DOI regulations contained in 30 C.F.R. § 221.49, an injection well is treated as a "producing well" and "average daily production" per well is, therefore, computed by counting injection wells. Accordingly, Marathon has computed the average daily production per well for the Grass Creek Unit to be less than 10 barrels per day for purposes of paying royalty to the DOI since 1972.

Accordingly, this Court is in accord with this "nutshell" quote from p. 21 of the Marathon Supplemental Brief:

> This Court has the power to determine for itself what is the meaning of the phrase "average daily production" in the statutes and in the regulations in light of all the relevant circumstances. We think it quite extraordinary that two federal agencies—the Interior Department and the FEA—should have regulations on the identical subject with the identical purpose (encouraging crude oil production from stripper leases) with such radically different consequences for a single property such as Marathon's Grass Creek Unit. We submit that both agencies cannot be simultaneously correct as to which interpretation is more effective in encouraging crude oil production. Even more important, it is unthinkable that, when Congress authorized the exemption of stripper crude from its newly imposed program of price controls, it intended the agencies administering those controls to turn their backs on the forty years of experience accumulated by the Interior Department on the very problem.

Nevertheless, recognizing the importance of the application of the doctrine of administrative expertise repeatedly laid down by the Supreme Court to prevent undue interference by courts with regulatory functions of national interest, we do adequate justice here by simply invalidating Ruling 1974-29 for the reasons stated herein.

The expertise of the FEA should be brought to bear upon these issues after the agency has given interested parties the opportunity to present evidence upon which it can then rationally base its conclusions. For this reason the Court, at this time, will not rule upon the issue of whether Ruling 1974-

29, even it if were legally enacted, would be arbitrary, unreasonable, or in conflict with its statutory authority.

OTHER HOLDINGS

Plaintiffs have alleged that regulations underlying Ruling 1974-29 found at 10 C.F.R. § 212.54 are invalid for failure of the CLC, FEO and FEA to observe procedural requirements of the APA in promulgating and adopting such. The Court finds, in view of the legislative requirement of expeditious promulgation by the CLC implementing TAPAA and EPAA, and of the necessity to quickly decontrol stripper lease prices once Congress' intent to do so was statutorily mandated in order that oil not be held off the market in anticipation of such price increase (see *Nader* v. *Sawhill*, 514 F.2d 1064 [Em.App.1974]), that "good cause" existed for the CLC's failure to follow APA notice and comment procedures. Rules promulgated by the FEO on December 27, 1973, expressly noted the "emergency nature of the Mandatory Petroleum Products Allocation Program" in asserting "good cause" for failure to follow otherwise required procedures. 39 Fed.Reg. 746, January 2, 1974. These regulations, adopted and revised by the FEO, were later adopted by the FEA. The original promulgation being lawful, such subsequent changes in the agency enforcing such regulations does not render them invalid under the APA. See *Nader* v. *Sawhill*, supra. It should be emphasized that the Court's holding applies only to procedural legality of the above regulations and in no sense constitutes accord upon the legality of the regulations' substance as presently interpreted and contended by FEA.

Having found Ruling 1974-29 void and ineffective to affect the rights of plantiffs herein, the Court need not address plaintiffs' third principal contention as to retroactive application of such Ruling. Nor is it necessary to address the government's contention that subsequent legislative enactments impliedly ratified Ruling 1974-29 by failure to address or revoke such administrative fiat. This reasoning is not persuasive in the absence of any showing Congress was made aware of such agency interpretation and actually considered it or an

existing problem relating to its application in subsequent deliberations. See *United States* v. *Calamaro*, 354 U.S. 351, 77 S.Ct. 1138, 1 L.Ed.2d 1394 (1957); *Rothenberg* v. *United States*, 233 F. Supp. 864 (J. Brown, D.Kan.1964), aff'd 350 F.2d 319 (10th Cir. 1965); *Kay* v. *Federal Communications Commission*, 143 U.S.App.D.C. 223, 443 F.2d 638 (1970). Congress is not deemed by the Courts to be omniscient as to each of the multitude of agency statutory interpretations tangentially affecting matters under its consideration.

IT IS THEREFORE ORDERED that Ruling 1974-29 is void and of no legal effect and that the FEA, or its successor the Department of Energy, is hereby enjoined from administrative use, application, implementation or enforcement of such Ruling against plaintiffs herein.

IT IS FURTHER ORDERED that regulations found at 10 C.F.R. § 212.54 are legally valid as promulgated in accordance with applicable APA procedural requirements.

IT IS FURTHER ORDERED that the costs of this action are assessed against the defendants herein.

APPENDIX D

ENERGY RESERVES GROUP, INC., and Suburban Propane Gas Corporation, Appellees,

Marathon Oil Company and Sklar & Phillips Oil Company, Intervenors-Appellees,

v.

DEPARTMENT OF ENERGY and James R. Schlesinger, Secretary, Department of Energy, Appellants.

SIERRA PETROLEUM CO., INC., Appellee,

Maurice L. Brown Company, Intervenor-Appellee,

v.

DEPARTMENT OF ENERGY and James R. Schlesinger, Secretary, Department of Energy, Appellants.

BRADEN-ZENITH, INC., Appellee,

v.

DEPARTMENT OF ENERGY and James R. Schlesinger, Secretary, Department of Energy, Appellants.

Nos. 10-15 to 10-17

Temporary Emergency Court of Appeals.

Argued May 8, 1978.

Decided Oct. 31, 1978.

Before CHRISTENSEN, BECKER and ZIRPOLI, Judges.

BECKER, Judge:

Introduction

In these cases the appellees question the validity of Ruling 1974-29 of the Fedeal Energy Administration (FEA), designated as an "interpretative" rule by FEA. If Ruling 1974-29 was interpretative, the ruling was exempt from the rule making requirements of § 553(b) and (c) Title 5 U.S.C., a part of the Administrative Procedure Act (APA). Section 553(b) of the APA permits all administrative agencies to issue interpretative rules without prior notice and opportunity for submission of written views, data and argument. The district court held that Ruling 1974-29 was not interpretative, but was legislative,[1] and therefore invalid uner § 553(b) and (c) of the APA, requiring notice and opportunity to comment prior to its adoption.

Appellants, Department of Energy (DOE) and the Secretary of Energy,[2] contend that Ruling 1974-29 was properly designated as interpretative of a regulation, 10 C.F.R. § 210.32(b), and of the underlying statutory provisions exempting crude petroleum produced by "stripper wells" from allocation and price regulation.

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[1] The district court used the term "substantive" but all parties agree that "legislative" was intended.

[2] FEA and the Administrator of FEA have been succeeded by the Department of Energy (DOE) and the Secretary of Energy as appellants.

Statement Of The Issue

Appellants, DOE and the Secretary of Energy, properly state that the issue[3] in these consolidated appeals is as follows:

> Whether the District Court erred in holding that Federal Energy Administration ("FEA") Ruling 1974-29 (39 F.R. 44414, December 24, 1974), which interpreted the stripper well exemption as excluding injection wells from the "well count" for purposes of applying the exemption, is null and void and without effect because it was published without utilizing the notice and comment provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b). [Footnote omitted.]

Section 553(b) of the APA

The applicable portion of § 553(b) of the APA is as follows:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> Except when notice or hearing is required by statute, *this subsection does not apply*—
>
> (A) to *interpretative rules*, general statements of policy or rules of agency organization, procedure, or practice. [Emphasis added.]

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[3] In an effort to sustain the decision of the district court, on grounds not relied on by the district court, appellees have undertaken to expand the issues as noted hereinafter.

Appellees contend generally that Ruling 1974-29 was by its nature and effect a "legislative" rule subject to the notice and comment requirements of § 553(b) and (c), and that therefore the designation of the ruling by FEA as interpretative is legally ineffective. Appellees also contend that the administrative action of issuing the ruling was subject to the stricter requirements of § 7(i) of the Federal Energy Administration Act (FEAA), which was § 766(i) Title 15 U.S.C. (repealed P.L. 95-91).

General Importance Of Decision

The determination of the issue presented by these opposing contentions, in favor of appellees would have potentially drastic adverse effects on the past, present and future administration of the emergency energy price and allocation programs, by casting serious doubt on the validity of all the rulings designated as interpretative rules by the successive agencies administering the emergency energy programs. But transcending the doubt cast on the validity of rulings of the successive agencies administering the emergency energy programs, is the potentially disastrous effect such a precedent would have on all rulings designated as interpretative, under § 553(b) of the APA by the numerous federal administrative agencies. The effects of a questionable construction of § 553(b) of the APA in these appeals cannot be isolated and applied only to the rulings of FEA and DOE because § 553(b) of the APA applies generally to all federal administrative agencies.

The possibility of these effects can be ascertained by an examination of the *reasons presented by appellees* to support their contention on the primary issue that, despite the designation of Ruling 1974-29 as interpretative by FEA, the Court should conclude that the Ruling was legislative, and not exempt from the requirements of § 553(b) and (c) of the APA. These reasons are as follows:

1. P.L. 93-153, the now repealed § 406(a) of the Trans-Alaska Pipeline Authorization Act (TAPAA) and § 4(e)(2)(A) of the Emergency Petroleum Allocation Act of

1973 (EPAA) provided a statutory exemption from price and allocation regulation of the first sale of crude oil produced in the United States from any lease "whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well." (This is not controverted.)

2. In § 406(c) of TAPAA and § 4(a) of EPAA Congress delegated authority to the Cost of Living Counsel (COLC) to promulgate regulations implementing the exemption of such wells. COLC was succeeded by FEA in the performance of this function. (This is not controverted.)

3. COLC (and later FEA) promulgated regulations defining the formula in computing average daily production that did not define the term "well", used in the statute, to exclude injection wells except possibly by implication. (It is necessarily conceded by appellees that the two regulations defining average daily production expressly provided that only wells "which produce crude petroleum" could be counted in the calculation of average daily production. 6 C.F.R. § 150.54(s); 10 C.F.R. § 210.32(b).)

4. In 1974, to expressly exclude injection wells from the calculation of average daily production, FEA issued Ruling 1974-29, designated by FEA as an interpretative ruling, without complying with either the notice or comment procedures of the APA.

5. The designation of Ruling 1974-29 as interpretative by FEA was not persuasive or legally binding on the courts.

6. Whether Ruling 1974-29 was legislative, rather than interpretative, should be determined by applying a test of whether the ruling had a "substantial impact" on the regulated parties. Among other authorities on which appellees rely as supporting this proposition are *National Helium Corporation* v. *FEA* (Em.App.1977) 569 F.2d 1137, and *Shell Oil Company* v. *FEA* (Em.App.1978) 574 F.2d 512.

7. The contention of appellants that Ruling 1974-29 was interpretative is rebutted by the fact that the original definitions of the elements of the stripper well exemption

were in the regulations 6 C.F.R. § 150.54(s) and 10 C.F.R. § 210.32(b), which were legislative in nature.

8. Ruling 1974-29 had a "substantial impact" on the regulated parties because it was the first effective notice to appellees that injection wells were excluded in computing average daily production, particularly since the Department of Interior had counted injection wells for purposes of qualifying for a reduced royalty. 30 C.F.R. § 221.49(b). "Substantial impact" in the contention of appellees, ranges from subjective disappointment in the interpretation contrary to the hopes, desires and beliefs of appellees, to interpretation of the statute, regulation or both having a future effect in a manner that is not reasonably anticipated by the affected parties, including the public, from the statutes in question.

9. Section 7(i) of the FEAA required the FEA to "resolve doubts about application of procedural safeguards in favor of their full application."

10. Ruling 1974-29 is void because of the failure of FEA to comply with the notice and comment procedures of § 553(b) of APA and § 7(i) of FEAA.

It is concluded that this intricate sophisticated reasoning of appellees is contrary to the decisions of the Supreme Court of the United States and the weight of applicable authorities in 1974 and thereafter, *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), and *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976); and that, for the reasons hereinafter stated, the result of acceptance of the contentions of the appellees would create a doctrine in administrative law that would seriously and adversely affect the accepted, and hitherto legal, practices of all federal administrative agencies including FEA and DOE in issuing interpretative rules without opportunity for notice and comment.

The Text of Ruling 1974-29

Ruling 1974-29, in question in these cases, was issued by FEA on December 24, 1974, as an interpretation of 10 C.F.R.

§ 210.32(b), the later of two consistent regulations defining "average daily production" of a property for the purposes of determining if the property qualified as a stripper well. (39 Fed.Reg. 44414). It is as follows:

Facts. Firm P, a producer of petroleum, produced during the preceding calendar year 150,000 barrels of crude petroleum and petroleum condensates, including natural gas liquids from 40 production wells located on Property A, as defined in 10 CFR 210.32. In addition, there were five injection wells in operation on that property last year. An injection well is one which is used to inject water, air, gas, steam or other materials into the ground to assist in the recovery of crude petroleum through producing wells. Wells which formerly produced crude petroleum may be used for injection purposes, or new wells may be drilled solely for the purpose of injecting materials into oil-bearing formations and reservoirs.

The average daily production per well from Property A was 10.27 barrels, based on the 40 production wells, whereas the average daily production per well would be 9.13 barrels if 45 wells, including the 5 injection wells, were used to calculate the average daily production figure.

Issue. Is an "injection" well a "well" for the purpose of determining whether the average daily production of a property was 10 barrels or less per well in the preceding calendar year, for purposes of the stripper well lease exemption of 10 CFR 210.32?

Ruling. No. Under the FEA regulations, the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease, is exempt from the mandatory price and allocation regulations. A stripper well lease is defined as a property whose average daily production did not exceed 10 barrels per day per well during the preceding calendar year. "Average daily production" is further defined in 10 CFR 210.32(b) as:

The qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the

> number of days in that year times the number of wells which produce crude petroleum and petroleum condensates, including natural gas liquids, from that property in that year.

Thus, the FEA regulations by their specific language provide that only wells "which produce crude petroleum" are to be counted in calculating average daily production for the purpose of determining whether the stripper well lease exemption applies. While injection techniques help to "produce" crude petroleum, they are not wells which themselves "produce" crude petroleum. Therefore, wells which did not actually yield or produce crude petroleum during the preceding calendar year are not production wells for this purpose. Whether the nonproducing well was an "injection" well, a disposal well, a dry well, a spent well or a shut-in well will not change this result.

History of the Stripper Well Exemption

What has become known as the "stripper well" exemption appeared in § 4(e)(2)(A) of the Emergency Petroleum Allocation Act of 1973 (EPAA), P.L. 93-159, § 751 *et seq.* Title 15 U.S.C., reading as follows:

> The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

The "stripper well" exemption was also contained in substantially the same language in § 406(a) of the earlier Trans-Alaska Pipeline Authorization Act (TAPAA), P.L. 93-153, § 1651 *et seq.* Title 43 U.S.C. In December 1975, the exemption was repealed by the Energy Policy and Conservation Act (EPCA), P.L. 94-163, § 6201 *et seq.* Title 42 U.S.C., and § 753 *et seq.* Title 15 U.S.C.

In 1976 the "stripper well" exemption was reinstated by § 121 of the Energy Conservation and Production Act (ECPA),

P.L. 94-385 which amended the EPAA by adding § 757(i) Title 15 U.S.C.

The price control regulations of FEA continuously excepted from maximum ceiling prices crude oil produced from stripper wells, except for the period from February 1, 1976, to August 31, 1976.

The history of the "stripper well" exemption has been carefully and accurately summarized by this Court in *Southern Union Production Company* v. *FEA* (Em.App.1978) 569 F.2d 1147, l.c. 1149, 1150, as follows:

> As enacted on November 23, 1973, the EPAA exempted from price controls the first sale of crude oil from leases whose daily average production did not exceed 10 barrels per well. On December 24, 1974, the FEA issued Ruling 1974-28, 39 Fed.Reg. 44414 (1974), confirming its determination that gas well condensate was ineligible for the stripper well exemption. This regulation is specifically challenged by appellants.
>
> Section 401 of the Energy Policy and Conservation Act of 1975, enacted on December 22, 1975, repealed the stripper well exemption of the EPAA. It is clear from the Conference Report, however, that Congress contemplated that stripper well production would be placed in the upper tier of the two-tier pricing program then in effect. The FEA amended its regulation to place stripper well crude oil under the upper tier, 10 C.F.R. § 212.71 *et seq.* . . .
>
> Section 121 of the Energy Conservation and Production Act of 1976, enacted on August 14, 1976, reinstated the stripper well exemption by amending the EPAA. 15 U.S.C. § 757(i) (Supp. 1977). The FEA then implemented the exemption of "stripper well crude oil", but continued to deny its application to condensate produced from gas wells. 10 C.F.R. 212.54, 41 Fed.Reg. 48319, 48323 (1976).
>
> Since the enactment of the EPAA in November, 1973, the FEA has consistently defined crude oil to include gas well condensate for jurisdictional purposes under section 4(a) of the Act, but has excluded gas well condensate from the stripper well exemption. Yet, when Congress reinstated the stripper well exemption in August, 1976, by

> adding section 8(i) to the EPAA, there was no attempt to change the FEA's interpretation. Rather Congress added as subsection 8(i)(4) the provision that, "The President may define terms used in this subsection consistent with the purposes thereof." [Footnotes omitted.]

The Successive Stripper Well Regulations And Rulings

In obedience to the statutory mandates the "stripper well" exemptions have been defined and clarified in the following successive regulations and rulings: 6 C.F.R. § 150.54(s); 10 C.F.R. § 210.32(b); Ruling 1974-28 approved in the *Southern Union Production Company* case, *supra;* and in Ruling 1974-29 under attack in this case.

Except for a typographical error occurring in 1974, which was quickly corrected, the regulations of FEA have consistently described (and interpreted) the phrase "average daily production" in regard to crude petroleum, to be the average daily production computed by dividing: "The qualified maximum total production of domestic crude petroleum . . . from a property during the preceding calendar year, divided by . . . the number of wells which produce crude petroleum . . . from that property in that year." 10 C.F.R. § 210.32(b); 6 C.F.R. § 150.54(s). (This quotation omits references to natural gas condensates or liquids.)

Material Part Of Ruling 1974-29

In December 1974, FEA issued Ruling 1974-29, the ruling in question in these cases quoted in full above, to interpret the regulation 10 C.F.R. § 210.32(b), and the underlying statutes. The material part of Ruling 1974-29 reads as follows:

> Thus, the FEA regulations by their specific language provide that only wells "which produce crude petroleum" are to be counted in calculating average daily production for the purpose of determining whether the stripper well lease exemption applies. While injection techniques help to "produce" crude petroleum, they are not wells which themselves, "produce" crude petroleum. Therefore, wells

> which did not actually yield or produce crude petroleum during the preceding calendar year are not production wells for this purpose. Whether the non-producing well was an "injection" well, a disposal well, a dry well, a spent well or a shut-in well will not change this result.

It is this part of Ruling 1974-29 that the district court held to be null and void because it was "substantive" [legislative] rather than "interpretative" in nature, and because FEA did not follow the notice and comment rule making requirements of § 553(b) Title 5 U.S.C. In this connection the district court concluded that the rule was not exempted from the notice and comment rule making requirements by subparagraph (A) of § 553(b) Title 5 U.S.C.

Legislative History Of The Stripper Well Exemption

The legislative history of § 4(e)(2)(A) of EPAA in the Joint Explanatory Statement of the Committee of Conference (Conference Report 93-628), 2 *U.S. Code Congressional and Administrative News, 93rd Congress, First Session 1973* 2688, l.c. 2694, 2695 is as follows:

> Section 4(e) of the House amendment also stated that no regulation under this section was to provide for allocation of, or specify (or prescribe a manner for determining) the price of, crude oil produced in a calendar month by any well, the average daily production of which did not exceed 10 barrels per day during the month preceding such calendar month.
>
> * * *
>
> *General.* The conference substitute basically follows the House amendment to the Senate bill. It provides for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product produced in or imported into the United States.

Section 406 of TAPAA, enacted earlier in 1973, provided the stripper well exemption in paragraph (a) and contained two

related paragraphs (b) and (c). Section 406 of TAPAA reads as follows:

> (a) The first sale of crude oil and natural gas liquids produced from any lease whose average daily production of such substances for the preceding calendar month does not exceed ten barrels per well shall not be subject to price restraints established pursuant to the Economic Stabilization Act of 1970, as amended, or to any allocation program for fuels or petroleum established pursuant to that Act or to any Federal law for the allocation of fuels or petroleum.
>
> (b) To qualify for the exemption under this section, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.
>
> (c) The agency designated by the President or by law to implement any such fuels or petroleum allocation program is authorized to conduct inspections to insure compliance with this section and shall promulgate and cause to be published regulations implementing the provisions of this section.

The legislative history of § 406 of TAPAA in the Joint Statement of the Committee of Conference (Conference Report No. 93-624), 2 *U.S. Code Congressional and Administrative News, 93rd Congress, First Session 1973* 2523, l.c. 2531-2532 reads as follows:

> Section 406, relating to stripper oil wells, was a Senate floor amendment to S.1081. The Conferees have adopted the general concept of the floor amendment, but have added new provisions to insure that the exemption is narrowly defined and prudently administered, and to insure that the incentive being granted is properly limited in accord with congressional intent.
>
> The purpose of exempting small stripper wells—wells whose average daily production does not exceed ten barrels per well—from the price restraints of the Economic Stabilization Act (now in Phase IV) and from any system of mandatory fuel allocation is to insure that direct or indirect price ceilings do not have the effect of resulting in any loss of domestic crude oil production from the premature shutdown of stripper wells for economic reasons.

As of January 1, 1973, there were 350,000 stripper wells producing ten barrels a day or less. Stripper wells account for 71 percent of all of the oil wells in this country, but produce an average of only 3.6 barrels per day, or only 13 percent of total U.S. domestic crude production. Many stripper wells are of only marginal economic value. When the costs of their operation exceed the value of their production, they are shut in, and a known and developed crude oil reserve is lost to U.S. production. Removing Phase IV price restraints from these marginal stripper wells has the effect of increasing the value of the crude oil they produce by about $1.30 per barrel (the difference between $4.02, the current per-barrel ceiling average under Phase IV, and $5.32, the per-barrel average price for "new" domestic crude oil production which is not subject to Phase IV). This price incentive will encourage owners and operators of stripper wells to maintain production and to keep these wells in operation for longer periods of time than would be possible if the value of their crude oil production were determined under Phase IV price ceilings. This increased incentive will, it is anticipated, permit stripper well operators to make new investments in the eligible wells and improve the gathering and other facilities for moving this oil to market.

The words "first sale" in Section 406(a) refer to the initial sale from the producer to a refiner, oil broker or other party. Thereafter, the exemption expires and any applicable provision of the Economic Stabilization Act or any mandatory allocation program may apply.

The exemption also runs only to "crude oil and natural gas liquids." It does not run to natural gas produced by these wells. Natural gas production and pricing continue to be regulated by the Federal or State agency having jurisdiction over the particular wells involved.

The Congress intends that the provisions of this section will be strictly enforced and regulated by the administering agency to insure that the limited exemption of this class of wells for the express purposes described above is not in any way broadened. To achieve this, Congress authorizes on-site inspections to insure compliance. Con-

gress also directs that the administering agency shall promulgate regulations to implement the provisions of this section before it becomes operative. The Conferees expect the administering agency to utilize State data regarding production volumes, and to provide by regulation safeguards against the manipulation of gerrymandering of lease units in a manner that evades the price control and allocation programs. [Emphasis added.]

These regulations shall be so designed as to provide safeguards against any abuse, over-reaching or altering of normal patterns of operations to achieve a benefit under this section which would not otherwise be available. Congress specifically intends that the regulations shall, among other things, prevent any "gerrymandering" of leases to average down high production wells with a number of low production stripper wells to remove the high production wells from price ceilings. The *sole* purpose and objective of this Section 406 is to keep stripper wells—those producing less than ten barrels per day—in production and to insure that the crude oil they produce continues to be available for U.S. refineries and U.S. consumers. It is not intended to confer any benefit on the owners and operators of wells producing in excess of ten barrels per day. The Congress also intends that the regulations provide appropriate limitations and provisions in the definition of "lease" to insure that an administratively workable system is established which does not work permit abuse.

Regulations Defining Average Daily Production Of Wells Under EPAA And TAPAA

COLC performed its mandatory obligations under EPAA and TAPAA to promulgate regulations in respect to stripper wells by issuing first 6 C.F.R. § 150.54 containing paragraph (s) reading as follows:

(s) *Stripper Wells*—(1) *Rule.* Effective November 27, 1973, the price charged for the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease is exempt.

(2) *Definitions.* As used in this paragraph—"Average daily production" means the qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of calendar days in that year times the number of *wells which produced crude petroleum* and petroleum condensates including natural gas liquids from that property in that year. To qualify as maximum total production, each well on the property must have been maintained at the maximum feasible rate of production, in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production. [Emphasis added.]

"Domestic crude petroleum" means crude petroleum produced in any of the several States, or the District of Columbia or from the "outer continental shelf" as defined in 43 U.S.C. 1331.

"First sale" means the first transfer for value by the producer or royalty owner. "Property" is the right which arises from a lease in existence in 1972 or from a fee interest to produce domestic crude petroleum in existence in 1972 and is coextensive with that property used in paragraph (b) of this section for purposes of determining "base production control level." "Stripper well lease" means a "property" whose average daily production of crude petroleum and petroleum condensates, including natural gas liquids, per well did not exceed 10 barrels per day during the peceding [sic] calendar year.

The above quoted provisions of 6 C.F.R. § 150.54(s) were later superseded by 10 C.F.R. § 210.32 in which FEA further refined the hurriedly drafted regulation, effective November 27, 1973, incorporating the essence of § 406 of TAPAA and § 4(e)(2)(A) of EPAA. Paragraph (b) of 10 C.F.R. § 210.32, once amended in other respects, consistently defined the term

"average daily production," in issue in these cases, as it was defined in 6 C.F.R. § 150.54(s) in the following language:

> (b) Definitions: "Average daily production" means the qualified maximum total production of crude oil, including condensates, produced from a property, divided by a number equal to the number of days in the year times the number of *wells that produced crude oil, including condensates*, from that property in that year. To qualify as maximum total production, each well on the property must have been maintained at the maximum feasible rate of production, in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production. [Emphasis added.]

I

Ruling 1974-29 Is Clearly Interpretative and Exempted From the Requirements of § 553(b) of the APA

While the applicable statutory and regulatory provisions were in force, in the substance and form set out above, the ingenious notion was advanced that Congress, in enacting the EPAA and TAPAA, intended to include "injection wells," employed to enhance recovery of crude petroleum and condensates, as "wells" in the statutory computation of "average daily production."

As stated above, FEA had previously dealt with this question by carefully setting forth in the mandatory regulations that only "wells which produced crude petroleum and petroleum condensates" were a factor in the formula for determining "average daily production." FEA consistently disallowed the count of injection wells in the formula. Despite the apparently clear statutory and regulatory provisions, FEA, confronted with claims such as those advanced in these cases, determined to put firmly at rest its official position concerning its interpretation of the term "average daily production" as used in the regulations (and statutes) by issuing in December 1974, its Ruling 1974-29, quoted above, interpreting the statutory

stripper well exemption defined in the existing mandatory legislative regulation 10 C.F.R. § 210.32.

It is submitted that Ruling 1974-29 is interpretative because (1) FEA deeemed it to be interpretative; (2) in its nature and effect the ruling was in fact and law an interpretation of the mandatory stripper well exemptions provided by EPAA and earlier by TAPAA, and defined by 10 C.F.R. § 210.32; (3) the ruling has no "impact," if its impact is a consideration in determining its nature. These reasons will be developed in detail hereinafter.

(1) Ruling 1974-29 was deemed by FEA to be interpretative. While this characterization by FEA is not controlling, its interpretation of its statutory mandate is entitled to judicial deference, under persuasive authorities and the prior rulings of this Court. *Southern Union Production Company* v. *FEA*, *supra*, 569 F.2d 1147, l.c. 1152 upholding a similar ruling interpreting the statutory stripper well exemption and the stripper well regulation; *Marathon Oil Co.* v. *FEA*, (Em.App.1976) 547 F.2d 1140, *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 378 (1977).

(2) By its nature and effect, Ruling 1974-29 was an interpretation of the stripper well exemption provided by EPAA and TAPAA, and defined in 10 C.F.R. § 210.32. An examination of the statute and Ruling 1974-29 makes this evident. The ruling does not purport to expand or constrict the meaning of the term "average daily production" as used in EPAA, TAPAA, and 10 C.F.R. § 210.32. It is in its nature a clarifying interpretation of the underlying statutes EPAA and TAPAA, and of the mandatory regulation 10 C.F.R. § 210.32, caused by the ingenious attempt to include injection wells in the statutory and regulatory formula. Further, Ruling 1974-29 was not only a reasonable construction (interpretation) of the statute and the regulation (the validity of which was accepted by the district court), but in addition may be the construction ultimately preferred by the courts.

It is sbumitted that what FEA did in issuing the ruling was exactly in nature what a court would do if, without Ruling 1974-29, the question were presented to a court in a judicial proceeding to review administrative action of the FEA in disallowing the claim of a producer.

If a court in an actual controversy, in interpreting the statutory exemption, can exclude injection wells from the formula, how does the nature of the process of judicial interpretation differ from the action of FEA in issuing Ruling 1974-29? The answer is that it does not differ.

The judicial process of interpretation does not become legislative in nature when an administrative agency engages in the same process and reasoning for the same purpose.

If an administrative rule in form and substance is interpretative it is within the exemption of § 553(b) of the APA. For the administrative law on the subject, attention is invited to 1 K. Davis, *Administrative Law Treatise* § 5.03, l.c. 304, discussing what interpretative rules may interpret as follows:

> Interpretative rules may interpret (1) a statute, (2) a legislative rule, (3) another interpretative rule, (4) judicial decisions, (5) administrative decisions, (6) administrative rulings, (7) any other law or interpretation, (8) any combination of items on this list, or (9) nothing.

Ruling 1974-29, under examination in these cases, expressly and permissibly interpreted another valid legislative rule, namely, the regulation 10 C.F.R. § 210.32(b). It also interpreted the underlying statutory language "average daily production," used in defining the stripper well exemption of EPAA and TAPAA, and repeated in 10 C.F.R. § 210.32(b). So Ruling 1974-29 satisfies the initial requirements of an interpretative rule that it interpret a statute or another rule or both. The contention that Ruling 1974-29 is legislative because it interprets a legislative regulation is unsound.

In regard to the stripper well exemption in Ruling 1974-29, the FEA did not undertake to expand or constrict the exemption. In fact, it had been commanded by TAPAA in § 406(c) to

administer the statutory exemption as provided by law strictly to prevent misuse thereof. The argument that § 406(c) of TAPAA commanding strict control of the exemption somehow makes this interpretative rule a legislative rule is not logical.

The following language from K. Davis, *Administrative Law of the Seventies* § 5.03-1, l.c. 152, aptly describes the nature of the process by which FEA issued Ruling 1974-29 as an interpretative ruling:

> But why, then, may an agency issue interpretative rules without a legislative grant of power[4] to do so? The theory is quite clear. When Congress enacts a statute and assigns the administration of it to an agency, the agency encounters questions the statute does not answer and the agency must answer them. The agency heads must instruct their staffs what to do about such questions, and the instructions are interpretative rules. But they are not binding on the courts. The courts may find them persuasive and may treat them as if they were binding, but the courts have the reserve of power to substitute their own judgment on all questions of statutory interpretation. The preliminary power of interpretation is in the agency, but the final power of interpretation is in the courts.

The above quotation defines the preliminary feature of an interpretative ruling, and the final power of the courts to substitute its own interpretation. In the case of a legislative rule or regulation, the courts usually refrain from substituting their judgment on the subject matter of the legislative rule or regulation. This is stated in the following language in 1958 from 1 K. Davis, *Administrative Law Treatise* § 5.03, l.c. 298 (1st ed. 1958):

> That the courts by their action usually recognize a distinction between interpretative rules and legislative rules is

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[4] It can reasonably be argued that the mention of interpretative rules in § 553(b) of the APA implies that all administrative agencies not forbidden to do so, are authorized to issue interpretive rules. [Footnote not part of quoted material.]

> reasonably clear. The distinction seems to be an essential part of our system. Yet we have the benefit of only occasional judicial explanation of the distinction, and the Supreme Court apparently has never provided a full-bodied discussion of it. Indeed, the term "legislative rule" or "legislative regulation" apparently does not appear in any Supreme Court opinion. [Footnote omitted.]
>
> The distinction is important because courts often substitute judgment as to the content of an interpretative rule but almost always (theoretically always) refrain from substituting judgment as to the content of a legislative rule.

If this Court concludes that Ruling 1974-29 is a legislative rule, probably the courts would be required, after it had been through the notice and comment requirements of § 553, to accept the resulting ruling of DOE without substituting their own construction of the words "average daily production." This result would be undesirable and is unsupported by any prior controlling decision. *Cf. Batterton* v. *Francis*, 432 U.S. 416, l.c. 425, 97 S.Ct. 2399, l.c. 2405, 53 L.Ed.2d 448, l.c. 456 (1977).

II

The Erroneous "Substantial Impact" Test

It is argued in support of the contention that Ruling 1974-29 is legislative rather than interpretative, that the ruling, though classified as interpretative, must be found to be legislative if it had a "substantial impact." This contention is unsound in law and experience. The words "substantial impact" do not appear in § 553[5] of the APA. They constitute an unwarranted judicial gloss on the statute misapplied in the context of these cases.

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[5] Only in § 7(i)(1)(C) of the FEAA is the term "substantial impact" mentioned in relevant energy statutes. As shown later § 7(i) is not applicable to Ruling 1974-29.

Even when a rule is legislative in form it will be treated as interpretative unless the administrative agency possesses and exercises delegated legislative authority in issuing it. The weight of persuasive and controlling legal authorities does not support application of this substantial impact test. 1 K. Davis, *Administrative Law Treatise* §§ 5.03, 5.04 (1st ed. 1958 and Supp. 1970); K. Davis, *Administrative Law of the Seventies* § 5.03-3, and Cumulative Supplement July 1977, l.c. 49, and authorities cited therein; *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). In 1977 Professor Davis summarized the current state of the law and the rule of the *Gilbert* case, *supra*, as follows:

> Some courts have been recently departing from the dominant law about the distinction between legislative rules and interpretative rules. The dominant law is and has long been that the distinction rests on exercise of delegated power to make law through rules, or lack of exercise of such power; the dominant law is not and never has been that the distinction rests on substantial impact of rules, or lack of it. Some of the law discussed below in this section is at variance with what is here called the dominant law. But at the end of 1976 Supreme Court rendered a very helpful opinion on the subject, declaring with clarity and force the law that has been dominant. In dealing with guidelines of the Equal Employment Opportunity Commission that differed from the Court's interpretation of a statute, the Court declared: "Congress . . . did not confer upon the EEOC authority to promulgate rules or regulations . . .
>
> This does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent . . . But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law . . . or to regulations which under the enabling statute may themselves supply the basis for imposition of liability." *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 50 L.Ed.2d 162 [sic] (343), 97 S.Ct. 401 (1976). The Court went on to reject the guidelines, saying that they were not "contemporaneous interpretation," that the agency had earlier enunciated the opposite position, and that the

> Court had declined in the past to follow administrative guidelines where they conflicted with earlier pronouncements of the agency.
>
> *The guidelines had substantial impact on those affected by them. But that fact did not turn them into regulations having force of law.* The Court in accordance with the dominant law, ignored the substantial impact of the rules in deciding that they should be given less weight than force of law. The test the Court used, in accordance with the dominant law, was lack of delegation by Congress of authority to make rules having force of law. In absence of such a delegation, the rules cannot be legislative; in the Court's words, they cannot be "regulations which under the enabling statute . . . themselves supply the basis for imposition of liability." That the test is not substantial impact but is exercise of delegated power to make law through rules has been Supreme Court law for many decades, and the 1976 opinion confirms that the law to that effect continues. [Emphasis added.] K. Davis, *Administrative Law of the Seventies* § 5.03-3, Cumulative Supplement July 1977, l.c. 49, 50.

The substantial impact test is illogical because every significant interpretative rule choosing between two or more interpretations of a legislative rule or a statute has an effect ("substantial impact") on the hopes, desires, expectations or beliefs of some of those regulated by the rule or statute. So, under the "substantial impact" test every significant interpretative rule automatically becomes a legislative rule by virtue of its effect. There is nothing in the APA to warrant employment of the "substantial impact" test to classify interpretative and legislative rules. The phrase "substantial impact" does not appear in the APA.

What then, under the APA, is the proper meaning and use of the phrase "substantial impact" in some cases? One proper meaning and use of the phrase is to determine whether administrative action under a legislative rule or regulation *issued without compliance with the APA notice and comment proce-*

dures should be invalidated. The concept is akin to the harmless error doctrine of the courts. Such a case was *National Helium Corporation* v. *FEA*, *supra*, 569 F.2d 1137. In that case this Court found that FEA had admittedly violated the APA by adopting legislative amendments to Part 212 of Title 10 C.F.R., price regulations, on April 5, 1974, without granting the notice and opportunity to comment required by the APA. This Court then proceeded to determine whether the lack of compliance with the notice and comment requirements of the APA was "fatal." Relying in part on *California* v. *Simon* (Emp.App.1974) 504 F.2d 430, *cert. denied*, 419 U.S. 1021, 95 S.Ct. 496, 42 L.Ed.2d 294 (1974), this Court concluded:

> When the questioned agency action does not jeopardize substantive rights or have a "substantial impact" on the purportedly regulated parties, or "create substantive effects upon the rights of the parties not involved in the proceedings," *then lack of compliance with the prior notice and comment requirements of the APA* is not fatal.
>
> * * *
>
> We conclude that *neither substantive nor procedural inadequacies in the refiner price rules*, as applied to gas processors, warrant allowing gas processors to operate unrestricted for the period at issue. [Emphasis added.] 569 F.2d l.c. 1146.

The case of *California* v. *Simon*, *supra*, was a similar case.

From the foregoing it is clear that the erroneous "substantial impact" test, advocated in these cases by appellees, was not employed in the *National Helium Corporation* case to determine whether a rule was interpretative or legislative. It was properly employed to determine whether to invalidate action under a regulation adopted without compliance with the notice and comment requirements of APA.

The following illustrative cases demonstrate the proper use and misuse of the "substantial impact" factor:

Case No. 1:

An administrative agency has no delegated power to issue legislative regulations. Nevertheless it promulgates a regulation legislative in form that has "substantial impact." The regulation will be treated as having no binding effect (interpretative) despite the substantial impact. This is *General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976).

Case No. 2:

An administrative agency has delegated power to issue legislative regulations and interpretative rules. It issues a regulation interpretative in form and substance which may have "substantial impact" on the hopes, desires or expectations of regulated parties. The regulation is interpretative despite the possibility of such substantial impact. This case is similar to these cases.

Case No. 3:

An administrative agency has delegated power to issue legislative regulations and interpretative rules. It issues a regulation legislative in form and substance without complying with the prior notice and comment procedures of § 553(b) and (c) of the APA. The invalid regulation has no substantial impact. The courts will not reverse the administrative action under the invalid regulation. This is *National Helium Corporation* v. *FEA* (Emp.App.1977) 569 F.2d 1137.

Case No. 4:

An administrative agency, subject to the requirements of the APA and § 7(i) of the FEAA, has delegated power to issue legislative regulations and interpretative rules. The agency issues a legislative regulation having future effect, and having substantial impact, without complying with the notice and comment procedures of § 7(i). The regulation is invalid. This is *Shell Oil Co.* v. *FEA* (Em.App.1978) 574 F.2d 512.

In a minority view, it was once permissible to employ a "substantial impact" test to create a common law rule that required prior notice and comment procedures when the APA does not require them. 1 K. Davis, *Administrative Law Treatise* § 6:30, l.c. 594, and § 6:31, l.c. 596-599 (2d ed. 1978); K. Davis, *Administrative Law of the Seventies* § 5.03-3, and Cumulative Supplement July 1977, l.c. 50. This minority view was applied sparingly, in some jurisdictions, until the Supreme Court of the United States unanimously decided the case of *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), construing § 553 of the APA to require a contrary result. Direct quotations from the opinion of the Supreme Court of the United States in the *Vermont Yankee Nuclear Power Corp.* case, *supra*, are the best evidence of its holdings. The quotations follow:

"In 1946, Congress enacted the Administrative Procedure Act, which as we have noted elsewhere was not only 'a new, basic and comprehensive regulation of procedures in many agencies,' *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 [70 S.Ct. 445, 94 L.Ed.2d 616] (1950), but was also a legislative enactment which settled "long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.' *Id.*, at 40 [70 S.Ct. 448]. Section 4 of the Act, [5 U.S.C. § 553 (1976 ed.)], dealing with rulemaking, requires in subsection (b) that 'notice of proposed rule making shall be published in the Federal Register . . .,' describes the contents of that notice, and goes on to require in subsection (c) that after the notice the agency 'shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.' Interpreting this provision of the Act in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 [92 S.Ct. 1941, 32 L.Ed.2d 453 (1972)], and *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 [93 S.Ct. 810, 35

L.Ed.2d 223 (1973)], we held that generally speaking this section of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.

"Even apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments. In *FCC* v. *Schreiber*, 381 U.S. 279, 290 [85 S.Ct. 1459, 14 L.Ed.2d 383 (1965)], the Court explicated this principle, describing it as 'an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.' 435 U.S. l.c. 523-525, 98 S.Ct. l.c. 1201, 1202, 55 L.Ed.2d l.c. 467, 468. [Footnote omitted.]

"* * * * *

"In prior opinions we have intimated that even in a rulemaking proceeding when an agency is making a ' "quasi-judicial" ' determination by which a very small number of persons are ' "exceptionally affected, in each case upon individual grounds," ' in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process. *United States* v. *Florida East Coast R. Co.*, 410 U.S., at 242, 245 [93 S.Ct. 810] quoting from *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 446 [36 S.Ct. 141, 60 L.Ed.2d 372 (1915)]. It might also be true, although we

do not think the issue is presented in this case and accordingly do not decide it, that a totally unjustified departure from well-settled agency procedures of long standing might require judicial correction.

"But this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."' *FCC* v. *Schreiber*, 381 U.S., at 290 [85 S.Ct. 1459], quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, at 143, 60 S.Ct. 437, 84 L.Ed.2d 656. Indeed, our cases could hardly be more explicit in this regard. The Court has, as we noted in *FCC* v. *Schreiber*, 381 U.S., at 290 and n. 17 [85 S.Ct. 1459], upheld this principle in a variety of applications, including that case where the District Court, instead of inquiring into the validity of the FCC's exercise of its rulemaking authority, devised procedures to be followed by the agency on the basis of its conception of how the public and private interest involved could best be served. Examining § 4(j) of the Communications Act of 1934, the Court unanimously held that the Court of Appeals erred in upholding that action. And the basic reason for this decision was the Court of Appeals' serious departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure. 435 U.S. l.c. 542-544, 98 S.Ct. l.c. 1211, 1212, 55 L.Ed.2d l.c. 478, 479. [Footnotes omitted.]

"* * * * *

"There are compelling reasons for construing § 4 in this manner. In the first place, if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the 'best' or 'correct' result, judicial review would be totally unpredictable. And the agencies, operating under this vague injunction to employ the 'best' procedures and facing the threat of reversal if they did

not, would undoubtedly adopt full adjudicatory procedures in every instance. Not only would this totally disrupt the statutory scheme, through which Congress enacted 'a formula upon which opposing social and political forces have come to rest,' *Wong Yang Sung* v. *McGrath*, 339 U.S., at 40 [70 S.Ct. 445], but all the inherent advantages of informal rulemaking would be totally lost.

"Secondly, it is obvious that the court in these cases reviewed the agency's choice of procedures on the basis of the record actually produced at the hearing [*Natural Resources Defense Council, Inc.* v. *U.S. Nuclear Regulatory Commission*], 178 U.S. App. D.C. [336], at 347, 547 F.2d [633], at 644, and not on the basis of the information available to the agency when it made the decision to structure the proceedings in a certain way. This sort of Monday morning quarterbacking not only encourages but almost compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings.

"Finally, and perhaps most importantly, this sort of review fundamentally misconceives the nature of the standard for judicial review of an agency rule. The court below uncritically assumed that additional procedures will automatically result in a more adequate record because it will give interested parties more of an opportunity to participate and contribute to the proceedings. But informal rulemaking need not be based solely on the transcript of a hearing held before an agency. Indeed, the agency need not even hold a formal hearing. See 5 U.S.C. § 553(c) (1976 ed.). Thus, the adequacy of the 'record' in this type of proceeding is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes. If the agency is compelled to support the rule which it ultimately adopts with the type of record produced only after a full adjudicatory hearing, it simply will have no choice but to conduct a full adjudicatory hearing prior to promulgating every rule. In sum, this sort of unwarranted judicial examination of perceived

procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress. 435 U.S. l.c. 546-548, 98 S.Ct. l.c. 1213, 1214, 55 L.Ed.2d l.c. 481, 482 [Footnote omitted.]

"* * * * *

"In short, nothing in the APA, NEPA, the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory *minima*, a matter about which there is no doubt in this case. 435 U.S. l.c. 548, 98 S.Ct. l.c. 1214, 55 L.Ed.2d l.c. 482."

Appellees' contentions in these appeals cannot be approved under the decision in the *Vermont Yankee Nuclear Power Corp.* case, *supra*.

III

There Was No Substantial Impact In These Cases

Assuming for purposes of discussion only that the "substantial impact" test determines whether an administrative rule is "interpretative" or "legislative," Ruling 1974-29 had no substantial impact on appellees.

If Ruling 1974-29 was a reasonable interpretation of the stripper well statutory exception of EPAA and TAPAA, or of 10 C.F.R. § 210.32, or both, it had no impact. In that event the impact came from the statute and valid legislative regulation being interpreted, not from the interpretative ruling.

It is submitted that Ruling 1974-29 is a reasonable interpretation of the term "average daily production" as used in § 406 of TAPAA, § 4(e)(2)(A) of EPAA, and in 10 C.F.R. § 210.32(b). As such it had no "impact" if such be a test. The "impact," if any, resulted earlier from the statute and from the regulation 10 C.F.R. § 210.32(b) found to be valid by the district court. The interpretation of § 406 of TAPAA and

§ 4(e)(2)(A) of EPAA to exclude injection wells in computing "average daily production" was a reasonable contemporaneous construction of the statute and created no new law or legislative rule.

IV

The Department of Interior and Other Regulations

The appellees seek to demonstrate the existence of substantial impact, caused by Ruling 1974-29, by claiming that a regulation 30 C.F.R. § 221.49(b) of the Department of the Interior (DOI) authorized inclusion of injection wells in computing average daily output. It is argued that "since 1936 the DOI has treated injection wells as wells for the purposes of determining 'average daily production' per well" of a stripper property. This factual contention is supported only by citations to 30 C.F.R. § 221.49(b), 30 C.F.R. Part 221, and factual conclusions contained in appellees' motion for summary judgment (R. 514-515). The cited regulations themselves disprove the broad conclusions of appellees that the cited regulation gives any right to count "injection wells" in the computation of "average daily production" per well. "Injection wells" as such are not mentioned in the regulations cited unless they qualify as "input wells" mentioned in 30 C.F.R. § 221.49(b), which reads as follows:

> (b)Wells approved by the supervisor as input wells shall be counted as producing wells for the entire month if so used 15 days or more during the month and shall be disregarded if so used less than 15 days during the month.

The entire 30 C.F.R. § 221.49 is set out as an addendum to show that appellees in their conclusions have overstated the language and effect of the DOI regulations. In that regulation, with the limited possible exceptional conditional privilege of counting input wells as producing wells (when approved in the discretion of the supervisor), the regulation clearly permits the count of "only wells which yield a commercial volume of production during at least part of the month. . . ." Similar

unpersuasive references are made by appellees to immaterial Rule 48 of the Texas Railroad Commission and World War II regulations of the Office of Price Administration (OPA). An examination of OPA interpretative bulletins will show that OPA could not have performed its administrative obligations without the power to issue interpretations of its regulations having substantial impact. From these immaterial and obscure references, unmentioned in any legislative history of EPAA or of TAPAA, appellees argue that they had a reasonable expectation that, prior to the issuance of Ruling 1974-29, they could count injection wells in computing the average daily production of "stripper wells," and that Ruling 1974-29 was the first notice they had to the contrary. This contention is lacking in factual or legal merit. Appellees have not shown any "substantial impact" or a resonable expectation that injection wells would be counted in the formula despite the fact that no crude oil or condensates were received therefrom. No basis for such a reasonable expectation existed. This is clearly developed and soundly concluded in the excellent opinion of Judge Luther B. Eubanks in *Grace Petroleum Corporation* v. *DOE* (W.D.Okl.1978) 456 F. Supp. 945.

V

Effect of The Federal Energy Administration Act

Appellees argue that § 7(i) of FEAA, *supra*, imposed stringent new rulemaking requirements on FEA that are applicable in determining the validity of Ruling 1974-29; that the requirements of the APA and also these new requirements must be met by FEA in issuing Ruling 1974-29; and that FEA failed to do so. In support of this contention *amici curiae* cite *Shell Oil Company* v. *FEA* (Em.App.1978) 574 F.2d 512.

The contention of appellees is lacking in merit because § 7(i) of FEAA does not apply to interpretative rules, such as Ruling 1974-29, exempted by the APA.

By its express governing and limiting provision, § 7(i) applied only to rules "as defined in § 551(4) of Title 5," a part of the

APA. The scope of § 7(i) of FEAA, relating to rules, regulations and procedures of energy administration, was expressly limited to rules, regulations and orders having the applicability and effect of a rule as defined in § 551(4) of the APA. Subsections 7(i)(1)(A) and (B) of the FEAA expressly so provide in the following paragraphs of § 7(i) of the FEAA:

> (i)(1)(A) Subject to paragraphs (B), (C), and (D) of this subsection, the provisions of subchapter II of chapter 5 of title 5, United States Code, shall apply to any rule or regulation, or any order having the applicability and effect of a rule as defined in section 551(4) of title 5, United States Code, issued pursuant to this Act, including any such rule, regulation, or order of a State or local government agency, or officer thereof, issued pursuant to authority delegated by the Administrator.
>
> (B)Notice of any proposed rule, regulation, or order described in paragraph (A) shall be given by publication of such proposed rule, regulation, or order in the Federal Register. In each case, a minimum of ten days following such publication shall be provided for opportunity to comment; except that the requirements of this paragraph as to time of notice and opportunity to comment may be waived where strict compliance is found to cause serious harm or injury to the public health, safety, or welfare, and such finding is set out in detail in such rule, regulation, or order. In addition, public notice of all rules, regulations, or orders described in paragraph (A) which are promulgated by officers of a State or local government agency shall to the maximum extent practicable be achieved by publication of such rules, regulations, or orders in a sufficient number of newspapers of statewide circulation calculated to receive widest possible notice.

The express reference to § 551(4) of the APA, as defining the type of rule, regulation or order for which the procedure of § 7(i) is required, incorporates § 551(4) in § 7(i). Section 551(4) of the APA is as follows:

> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval

> or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing. [Emphasis added.]

Section 7(i)(1)(A) of the FEAA expressly by reference affirmed the coverage of the remaining provisions of the APA to rules that did not have future effect.

A rule, such as Ruling 1974-29, interpreting an existing statute or existing legislative regulation relating in time back to the enactment of the statute or adoption of the regulation is not a rule having a *"future effect"* as defined in § 551(4) Title 5 U.S.C. Therefore it is not subject to the provisions of § 7(i) of the FEAA. Interpretative rules simply state what the statute or regulation has always meant in the opinion of the administrative agency issuing the interpretative rule. Any other view would destroy the clear exemption contained in § 553(b) of the APA expressly reaffirmed in § 7(i)(1)(A) of the FEAA.

Shell Oil Company v. *FEA*, *supra* (Em.App.1978) 574 F.2d 512, illustrates the point. In that case the validity of a regulation establishing future prices of unleaded gasoline was issued on July 1, 1974, by FEO (predecessor to FEA). The pricing regulation in question was a legislative, rather than an interpretative, rule of general applicability, to have *"future effect"* as defined in § 551(4) of the APA. This was not seriously questioned. As such it was subject to the notice and comment procedures of § 553 of the APA and § 7(i) of the FEAA. Under these circumstances, finding that FEA did not comply with the APA and the FEAA, this Court did not hesitate to hold that the challenged price regulation was invalid. In that case the substantial impact problem did not appear because the presence of substantial impact was not in doubt.

The opinion in *Shell Oil Company* v. *FEA*, *supra*, is not controlling here because Ruling 1974-29 was not a legislative rule having future effect as defined in § 551(4) of the APA. It was an interpretative rule having no future effect. It clarified the past and continuing nature of the stripper well exemption

of EPAA, TAPAA and 10 C.F.R. § 210.32(b). As such it was exempt from the notice and comment procedures of both the APA and the FEAA. The legislative history as well as the express provisions of the APA and FEAA make this clear.

Because the FEAA and § 7(i) thereof are clearly inapplicable to Ruling 1974-29, the references to the legislative history of the FEAA and to *Shell Oil Company* v. *FEA*, *supra*, are irrelevant.

VI

The contention of appellees that the Department of Energy (DOE) as successor to FEA must start anew and comply with the notice and comment requirements of the APA and FEAA in respect to Ruling 1974-29 is a sterile concept. If DOE starts anew and gives notice and opportunity to comment under § 553 of APA and § 7(i) of FEAA it can reissue Ruling 1974-29 and possibly make it retroactive under the doctrine of the *National Helium Corporation* case, *supra*, and *California* v. *Simon*, *supra*.

In the meantime the vast number of interpretative rulings of other administrative agencies, affected by the application of appellees' arguments, if accepted, would create chaos in federal administrative agencies, disturb settled legal doctrines and spawn much needless litigation.

Even if it is assumed contrary to fact that Ruling 1974-29 should have but did not comply with § 553(b) of the APA and § 7(i) of FEAA, there is no fundamental unfairness in its application to appellees, and it should be upheld. *National Helium Corporation* v. *FEA*, *supra*; *California* v. *Simon*, *supra*. There is no fundamental unfairness in the application of Ruling 1974-29 because it is a reasonable interpretation of the stripper well exemption of EPAA, TAPAA and the regulation 10 C.F.R. § 212.32(b).

In each of these actions the judgment is reversed and the action remanded for further proceedings consistent with this opinion.

ADDENDUM

§ 221.49 Royalty rates on oil; sliding- and step-scale leases (public land only).

Sliding- and step-scale royalties are based on the average daily production per well. The supervisor shall specify which wells on a leasehold are commercially productive, including in that category all wells, whether produced or not for which the annual value of permissible production would be greater than the estimated reasonable annual lifting cost, but only wells which yield a commercial volume of production during at least part of the month shall be considered in ascertaining the average daily production per well. The average daily production per well for a lease is computed on the basis of a 28-, 29-, 30-, or 31-day month (as the case may be), the number of wells on the leasehold counted as producing and the gross production from the leasehold. (Tables for computing royalty on the sliding-scale and on the step-scale basis may be obtained upon application to the supervisor.) The supervisor will determine which commercially productive wells shall be considered each month as producing wells for the purpose of computing royalty in accordance with the following rules, and his discretion may count as producing any commercially productive well shut-in for conservation purposes:

(a) For a previously producing leasehold, count as producing for every day of the month each previously producing well that produced 15 days or more during the month, and disregard wells that produced less than 15 days during the month.

(b) Wells approved by the supervisor as input wells shall be counted as producing wells for the entire month if so used 15 days or more during the month and shall be disregarded if so used less than 15 days during the month.

(c) When the initial production of a leasehold is made during the calendar month, compute royalty on the basis of producing well-days.

(d) When a new well is completed for production on a previously producing leasehold and produces for 10 days or more during the calendar month in which it is brought in, count such new wells as producing every day of the month, in arriving at the number of producing well-days. Do not count any new well that produces for less than 10 days during the calendar month.

(e) Consider "head wells" that make their best production by intermittent pumping or flowing as producing every day of the month, provided they are regularly operated in this manner, with approval of the supervisor.

(f) For previously producing leaseholds on which no wells produced for 15 days or more, compute royalty on a basis of actual producing well-days.

(g) For previously producing leaseholds on which no wells were producing during the calendar month but from which oil was shipped, compute royalty at the same royalty percentage as that of the last preceding calendar month in which production and shipments were normal.

(h) Rules for special cases not subject to definition, such as those arising from averaging the production from two distinct sands or horizons when the production of one sand or horizon is relatively insignificant compared to that of the other, shall be made by the supervisor as need arises.

(i)(1) In the following summary of operations on a typical leasehold for the month of June, the wells considered for the purpose of computing royalty on the entire production of the property for the months are indicated.

Well No.	Record	Count (marked X)
1	Produced full time for 30 days	X
2	Produced for 26 days; down 4 days for repairs	X
3	Produced for 28 days; down June 5, 12 hours, rods; June 14, 6 hours, engine down; June 25, 24 hours; June 26, 24 hours, pulling rods and tubing	X
4	Produced for 12 days; down June 13 to 30 .	
5	Produced for 8 hours every other day (head well)	X
6	Idle producer (not operated)	
7	New well, completed June 17; produced for 14 days	X
8	New well, completed June 22; produced for 9 days	

(2) In this example there are eight wells on the leasehold, but wells 4, 6, and 8 are not counted in computing royalties. Wells 1, 2, 3, 5 and 7 are counted as producing for 30 days. The average production per well per day is determined by dividing the total production of the leasehold for the month (including the oil produced by wells 4 and 8) by 5, the number of wells counted as producing, and dividing the quotient thus obtained by the number of days in the month.

CHRISTENSEN, Judge, concurring:

While concurring in the result reached above and with most of Judge Becker's analysis and reasoning, I feel constrained to add the following comments.

I am troubled by the unqualified assertion that there is nothing in the APA to warrant employment of the "substantial impact" test to classify interpretative and legislative rules. Whether a regulation is a mere "interpretation" under some

circumstances cannot be evaluated confidently without consideration of its effect upon the industry and the public from the viewpoints of essential fairness, due process, departure from established practices and financial or other consequences. Nor do I believe the test is as simple as the ascertainment of what administrative rulings would require a legislative grant from Congress, all others necessarily being interpretive. I do not so understand *General Electric Co.* v. *Gilbert*, vis-a-vis *Batterton* v. *Francis*, despite the quotation from Professor Davis concerning the former. *Batterton* involved the particularized delegation of legislative authority. The point in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Counsel*, was that rulemaking procedures beyond the concededly applicable requirements of APA may not be insisted upon by the courts, not that the necessity of minimum rulemaking procedures could be avoided under the guise of "interpretations" to the extent applicable. Even as to the issue involved there the possibility of exception under some circumstances was noted. The abrasion of due process, principled fairness, long standing practices, and other impacts may be more relevant to the determination of whether a purported "interpretation" is really "legislative" in character than the detailed procedures through which admittedly essential rulemaking is to be handled by an agency.

Nor do I agree that the propriety of an agency "interpretation" necessarily is measured by what a court itself might do in the interpretation of a statute or regulation. Courts may have no recourse but to interpret these in accordance with the implied intent of Congress or as an alternative to a declaration of invalidity for constitutional infirmity. An agency often has greater flexibility and wider duty, including the obtaining of the input of additional viewpoints, practical as well as legal, through observance of rulemaking procedures to the extent mandated by the APA and, within its terms, by the FEAA.

The qualifications expressed above are not decisive in this particular case—if, indeed there is anything in Judge Becker's opinion intended to be irreconcilable with them. Notwith-

standing some cross currents engendered by a considerable stirring of waters in the arguments, no significant impacts appear to operate against the ruling in question. And a holding that "a well which produces crude petroleum" means, as contemplated by the properly adopted and subsisting regulations and in view of the seminal statute, a well that produces or yields such petroleum directly rather than one which may be utilized as part of a system to obtain indirectly crude petroleum from a producing well, seems essentially the sort of interpretation that must have been intended by the APA exception to the rulemaking requirement.

ZIRPOLI, Judge, dissenting:

For the reasons stated below, I must respectfully dissent.

This is an appeal by the Secretary of Energy from a decision of the district court declaring a ruling of the Federal Energy Administration ("FEA")[1] procedurally invalid and enjoining the agency from enforcing it against the seven plaintiff-appellees. The district court found FEA Ruling 1974-29, 39 Fed.Reg. 44414 (1974) invalid because the agency failed to employ the notice and comment procedures required by the Administrative Procedure Act ("APA"), 5 U.S.C. section 553(b). I would affirm the district court.

In three separate actions filed in the district court for the District of Kansas, plaintiffs and intervenors, seeking declaratory and injunctive relief, challenged the ruling on procedural and substantive grounds. After the plaintiffs in *Energy Reserves Group, Inc.* obtained a preliminary injunction enjoining the enforcement of any final agency order based on

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[1] On October 1, 1977, the Department of Energy assumed the duties of the FEA pursuant to the Department of Energy Organization Act, Pub.L. No. 95-91, 42 U.S.C. § 7101, *et seq.*, and Executive Order No. 12009, 42 Fed.Reg. 46267 (1977). I will refer, however, to the FEA, rather than to the DOE, since we are here concerned with the action of the former agency.

Ruling 1974-29, the parties in all three actions entered into a stipulation consolidating the cases for a ruling from the court on three issues:

> 1. Whether Ruling 1974-29 issued by the FEA on December 24, 1974, 39 Fed. Reg. 44414, is arbitrary, unreasonable or in conflict with the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651, *et seq.*, and the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. §§ 751, *et seq.*
>
> 2. Whether Ruling 1974-29 was issued by the FEA in compliance with the APA, 5 U.S.C. § 553.
>
> 3. If Ruling 1974-29 is valid, whether the Ruling may be applied to the plaintiffs' sales of crude oil prior to December 24, 1974, the date on which the Ruling was issued by the FEA.

On cross-motions for summary judgment, the district court, without reaching the issues of the substantive validity of the ruling, or of the propriety of its retroactive application, found the ruling procedurally defective because of the agency's failure to afford interested parties an opportunity to comment on the proposed rule, as required by the APA.

The Stripper Well Exemption

The price which producers of domestic crude oil could lawfully charge for their product has been subject to regulation since August 1973.[2] Recognizing, however, that certain oil produc-

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[2] The Cost of Living Council ("CLC") issued regulations establishing the two-tier oil pricing system pursuant to the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note. These regulations were subsequently adopted prusuant to the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 751, *et seq.* This court has addressed certain issues presented by the two-tier system of crude oil prices and upheld various aspects of the system in *Griffin* v. *United States*, 537 F.2d 1130 (Em.App.1976), *cert. denied*, 429 U.S. 919, 97 S.Ct. 313, 50 L.Ed.2d 286 (1976); *Cities Service Co.* v. *FEA*, 529 F.2d 1016 (Em.App.1975), *cert. denied*, 426 U.S. 947, 96

ing properties could not be operated profitably under the price ceiling, Congress exempted such marginal properties from price controls in two pieces of legislation—the Trans-Alaska Pipeline Authorization Act ("TAPAA"), 43 U.S.C. §§ 1651, *et seq.*, and the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. §§ 751, *et seq.*[3] Section 4(e)(2)(A)[4] of the EPAA provided that:

> The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

Oil produced from wells generating no more than ten barrels per day—commonly known as stripper wells—was thus exempt from domestic crude oil price controls. The exemption was motivated by the fear that stripper wells, whose per barrel cost of extracting oil is higher than it is for more productive wells, could not operate profitably under price controls and

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S.Ct. 3166, 49 L.Ed.2d 1184 (1976); *Pasco Inc.* v. *FEA*, 525 F.2d 1391 (Em.App.1975); *Consumers Union of United States, Inc.* v. *Sawhill*, 525 F.2d 1068 (Em.App. 1975); and *Nader* v. *Sawhill*, 514 F.2d 1064 (Em.App.1975).

[3] The EPAA stripper exemption became law on November 27, 1973, eleven days after the TAPAA exemption, which it superseded.

[4] This section was repealed on December 22, 1975, by section 401 of the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 946. The stripper well exemption was reinstated in an amendment to the EPAA contained in section 121 of the Energy Conservation and Production Act, Pub.L. No. 94-385, 15 U.S.C. § 757(i), enacted on August 14, 1976. The FEA implemented the exemption through the issuance of regulations contained at 10 C.F.R. § 212.54.

would be shut down, thus depriving the nation of the substantial amount of crude oil they produce.[5]

In section 4(e)(2)(C) of the EPAA, Congress delegated legislative authority to the Cost of Living Council ("CLC") to promulgate regulations implementng the stripper well exemption. The regulations defined certain of the relevant terms, but failed to define precisely the term "well," except perhaps by

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[5] The purpose of exempting small stripper wells—wells whose average daily production does not exceed ten barrels per well—from the price restraints of the Economic Stabilization Act (now in Phase IV) and from any system of mandatory fuel allocation is to insure that direct or indirect price ceilings do not have the effect of resulting in any loss of domestic crude oil production from the premature shutdown of stripper wells for economic reasons. As of January 1, 1973, there were 350,000 stripper wells producing ten barrels a day or less. Stripper wells account for 71 percent of all of the oil wells in this country, but produce an average of only 3.6 barrels per day, or only 13 percent of total U.S. domestic crude production.

Many stripper wells are of only marginal economic value. When the costs of their operation exceed the value of their production, they are shut in, and a known and developed crude oil reserve is lost to U.S. production. Removing Phase IV price restraints from these marginal stripper wells has the effect of increasing the value of the crude oil they produce by about $1.30 per-barrel (the difference between $4.02, the current per-barrel ceiling average under Phase IV, and $5.32, the per-barrel average price for "new" domestic crude oil production which is not subject to Phase IV). This price incentive will encourage owners and operators of stripper wells to maintain production and to keep these wells in operation for longer periods of time than would be possible if the value of their crude oil production were determined under Phase IV price ceilings. This increased incentive will, it is anticipated, permit stripper well operators to make new investments in the eligible wells and improve the gathering and other facilities for moving this oil to market.

TAPAA Conf.Rep. No. 93-624, 93rd Cong., 1st Sess., [1973] U.S. Code Cong. & Admin.News, pp. 2523, 2531-32 [hereinafter referred to as TAPAA Conf.Rep.].

implication.[6] It was this gap in the regulatory scheme, later sought to be cured through the issuance of Ruling 1974-29, that lies at the foundation of this lawsuit, for appellees contend that certain types of wells, known as injection wells, should be counted for purposes of determining the average daily production of the wells on a particular property. The FEA sought to exclude such wells through the issuance of an "interpretation" of its earlier regulation, which had exempted stripper well

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[6] [6 C.F.R.] § 150.54 Certain price adjustments.

(s) *Stripper Wells*—(1) *Rule.* Effective November 27, 1973, the price charged for the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease is exempt.

(2) *Definitions.* As used in this paragraph "Average daily production" means the qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of calendar days in that year times the number of wells which produced crude petroleum and petroleum condensates including natural gas liquids from that property in that year. To qualify as maximum total production, each well on the property must have been maintained at the maximum feasible rate of production, in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production.

"Domestic crude petroleum" means crude petroleum produced in any of the several States, or the District of Columbia or from the "outer continental shelf" as defined in 43 U.S.C. 1331.

"First sale" means the first transfer for value by the producer or royalty owner.

"Property" is the right which arises from a lease in existence in 1972 or from a fee interest to produce domestic crude petroleum in existence in 1972 and is coextensive with that property used in paragraph (b) of this section for purposes of determining "base production control level."

"Stripper well lease" means a "property" whose average daily production of crude petroleum and petroleum condensates, including natural gas liquids, per well did not exceed 10 barrels per day during the preceding calendar year.

38 Fed.Reg. 34465 (1973).

leases from price controls and defined stripper well leases in terms of average daily production per well.

A crude oil producing property typically passes through two stages—the initial, or primary production phase, and the later, or secondary recovery phase. During the primary production stage, oil is brought to the surface by means of the natural pressure in an underground oil reservoir. When the reservoir is depleted to the degree that its internal pressure is no longer sufficient to push the oil to the surface, secondary recovery techniques may be used. Secondary recovery involves the injection of fluids into the producing formation to drive the crude oil to the surface, and injection wells are used for this purpose. Such wells do not produce petroleum in the sense that oil is brought to the surface through them, but they do contribute to or make possible the recovery of petroleum via other wells on the property. The CLC regulations implementing the stripper well exemption defined a stripper well lease as one in which production did not exceed ten barrels per well per day, and those regulations, insofar as they defined or limited the term "well" at all, did so by making reference to "the number of wells which produced crude petroleum . . . from that property in that year."[7]

These regulations were published on December 14, 1973, approximately one month after the stripper well exemption was created in the EPAA and TAPAA. A year later, on December 24, 1974, the FEA issued Ruling 1974-29, which, purporting to interpret the implementing regulation, stated that the FEA did not consider injection wells to be wells for purposes of the exemption.[8] Appellees all hold interests in

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[7] *Id.*

[8] [Ruling 1974-29]

PRODUCTION WELLS FOR PURPOSES OF THE "STRIPPER WELL LEASE" EXEMPTION

Facts. Firm P, a producer of petroleum, produced during the preceding calendar year 150,000 barrels of crude petroleum and petroleum condensates, including natural gas liquids from 40

crude oil producing properties that would qualify for the exemption only if injection wells can be included in the computation. Plaintiff-appellee Braden-Zenith, Inc., for example, alleged in its complaint that it owns an interest in an oil produc-

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production wells located on Property A, as defined in 10 CFR 210.32. In addition, there were five injection wells in operation on that property last year. An injection well is one which is used to inject water, air, gas, steam or other materials into the ground to assist in the recovery of crude petroleum through producing wells. Wells which formerly produced crude petroleum may be used for injection purposes, or new wells may be drilled solely for the purpose of injecting materials into oil-bearing formations and reservoirs.

The average daily production per well from Property A was 10.27 barrels, based on the 40 production wells, whereas the average daily production per well would be 9.13 barrels if 45 wells, including the 5 injection wells, were used to calculate the average daily production figure.

Issue. Is an "injection" well a "well" for the purpose of determining whether the average daily production of a property was 10 barrels or less per well in the preceding calendar year, for purposes of the stripper well lease exemption of 10 CFR 210.32?

Ruling. No. Under the FEA regulations, the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease, is exempt from the mandatory price and allocation regulations. A stripper well lease is defined as a property whose average daily production did not exceed 10 barrels per day per well during the preceding calendar year. "Average daily production" is further defined in 10 CFR 210.32(b) as:

> The qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of days in that year times the number of wells which produce crude petroleum condensates, including natural gas liquids, from that property in that year.

Thus, the FEA regulations by their specific language provide that only wells "which produce crude petroleum" are to be counted in calculating average daily production for the purpose of determining whether the stripper well lease exemption applies. While injection techniques help to "produce" crude petroleum, they are not wells which themselves "produce" crude

ing property that yielded approximately 80 barrels of crude oil per day for the 12-month period ending September 30, 1976. There were 14 wells on the property during that year, nine of them injection wells, without which no oil at all could have been obtained. Thus, if all 14 wells are counted for purposes of computing average production per well, Braden-Zenith would have been exempt from price controls. Under Ruling 1974-29, however, the nine injection wells are not included in the computation, and the remaining five wells are deemed to have produced more than 10 barrels per day.

Rulemaking Under The APA

A. Legislative and Interpretative Rules

The APA[9] requires notice and an opportunity for interested persons to comment prior to the promulgation of a new rule. An exception to such formal rulemaking requirements, however, is provided in 5 U.S.C. § 553(b) for interpretative rules, and the FEA contends that Ruling 1974-29 is the epitome of an interpretative rule, since it merely seeks to define a term contained in an underlying regulation. *See Gibson Wine Co.* v. *Snyder*, 90 U.S.App.D.C. 135, 137, 194 F.2d 329, 331 (1952); *Continental Oil Co.* v. *Burns*, 317 F.Supp. 194, 198 (D.Del.1970). The mere fact that a rule appears to be definitional in form, however, does not preclude a finding that it is legislative rather than interpretative and thus subject to the

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petroleum. Therefore, wells which did not actually yield or produce crude petroleum during the preceding calendar year are not production wells for this purpose. Whether the nonproducing well was an "injection" well, a disposal well, a dry well, a spent well or a shut-in well will not change this result.

39 Fed.Reg. 44414 (1974).

[9] Section 4 of the APA, 5 U.S.C. § 553, was made applicable to the CLC by section 207 of the ESA. Section 207 of the ESA is incorporated into the EPAA by section 5 of the latter Act. 15 U.S.C. § 754(a)(1).

formal rulemaking procedures of the APA. *See* 1 K. Davis, *Administrative Law Treatise* § 5.03 at 303 (1958) (discussing *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 64 S.Ct. 1215, 88 L.Ed. 1488 (1944)). If Congress has delegated lawmaking power to the agency, then rules issued pursuant to that grant are legislative, whether such rules are cast in the form of definitions or in more traditional statutory form.[10] The existence of such a delegation of power does not limit an agency to the issuance of legislative rules, but if such a grant has been made, a reviewing court must determine into which category the rule falls, and that determination is constrained neither by the form of the rule nor by the label attached to it by the agency. *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972). The FEA's contention that Ruling 1974-29 defines a term contained in an underlying regulation and is therefore interpretative rather than legislative is particularly difficult to sustain in view of the fact that the agency itself chose to define the other central terms of the stripper well exemption through the issuance of a legislative regulation.[11]

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[10] Davis, commenting on *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), characterized the result reached by the Supreme Court as follows:

> The Court, in accordance with the dominant law, ignored the substantial impact of the rules in deciding that they should be given less weight than force of law. *The test the Court used, in accordance with dominant law, was lack of delegation by Congress of authority to make rules having force of law. In the absence of such a delegation, the rules cannot be legislative;* in the Court's words they cannot be "regulations which under the enabling statute . . . themselves supply the basis for imposition of liability."

K. Davis, *Administrative Law of the Seventies* § 5.03-3 at 50 (Cum.Supp.1977) (emphasis added). The Court in *Gilbert* was faced with the question of whether a regulation of the EEOC should be treated as having the force of legislation.

[11] *See* n.6 *supra*.

Rather than be bound by the agency's own classification, many courts have attempted to discern the impact of the rule on regulated parties and have held those rules with substantial impact to be legislative and thus subject to formal rulemaking procedures. The FEA asserts that the substantial impact test has been discredited and abandoned as a means for distinguishing legislative from interpretative rules,[12] but the agency's interment of the test apears to be premature. This court has recently had occasion to advert to the role of the substantial impact test in judicial review of administrative action, and the language of that case is particulary appropriate here:

> In addition to the "good cause" exception to the notice and comment requirements of 5 U.S.C. § 553, there is an exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." § 553(b)(3)(A). In construing this exception, rather than rely on a "facile semantic distinction" between interpretative rules and substantive or legislative rules, courts have looked instead to the "basic purpose of [the]

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[12] *See, e.g., Eastern Kentucky Welfare Rights Organization* v. *Simon*, 165 U.S.App.D.C. 239, 251, 506 F.2d 1278, 1290-91 n.30 (1974) (substantial impact test not controlling where the rule is clearly interpretative in nature and without legally binding effect). Professor Davis takes the position that the substantial impact test should not be used to distinguish legislative from interpretative rules, and that the agency's characterization of its own action should control such classification. Davis states that the test may properly be used, however, to determine whether a particular rule, even though it is interpretative, should be subject to formal rulemaking requirements. *See* K. Davis *Administrative Law of the Seventies* § 5.03 at 148, § 6.01-7 at 193 (1976). Since interpretative rules are expressly exempted from the rulemaking requirements of section 4 of the APA, 5 U.S.C. § 553, however, it appears unlikely that, were Ruling 1974-29 found to be interpretative, the agency could be required to institute formal rulemaking in connection with its issuance. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978).

statutory requirements [of notice and comment]" in deciding whether the requirements should be imposed. *Pharmaceutical Manufacturer's Association* v. *Finch*, 307 F.Supp. 858, 863 (D.Del.1970). When an agency action has "palpable effects" upon the regulated industry and the public in general, it is necessary to expose that action "to the test of prior examination and comment by the affected parties." *National Motor Freight Traffic Association* v. *United States*, 268 F.Supp. 90, 96 (D.D.C.1967) (three judge court), aff'd per curiam, 393 U.S. 18 (1968).

The APA's rulemaking procedures "were designed to assure fairness and mature consideration of rules of general application." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 764, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969). The prior publication and opportunity for comment requirements enable "the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Texaco, Inc.* v. *FPC*, 412 F.2d 740, 744 (3 Cir. 1969). When the questioned agency action does not jeopardize substantive rights or have a "substantial impact" on the purportedly regulated parties, or "create substantive effects upon the rights of the parties not involved in the proceedings," then lack of compliance with the prior notice and comment requirements of the APA is not fatal. *Pennsylvania* v. *United States*, 361 F.Supp. 208, 220-22 (N.D.Pa.) (three judge court), *aff'd*, 414 U.S. 1017, 94 S.Ct. 440, 38 L.Ed.3d 310 (1973).

National Helium Corp. v. *FEA*, 569 F.2d 1137, 1145-46 (Em.App.1977).

B. Ruling 1974-29 Had a Substantial Impact

While arguing that the test is an inappropriate one, the FEA asserts that the ruling in any event had no substantial impact. Whether one looks to the effect of the ruling on crude oil producers seeking to take advantage of the stripper well exemption or on the oil consuming public,[13] however, it is difficult to avoid the conclusion that it had a significant impact. The

[13] *See* n.5 *supra*.

agency does not dispute the fact that the exclusion of injection wells from the computation of average daily production per well has a sharp economic impact on both producers and consumers. Appellant would have this court conclude, however, that such treatment of injection wells was mandated by Congress when it enacted the exemption, and that Ruling 1974-29 merely restated the obvious intent of the legislation.[14]

If Ruling 1974-29 were as clearly redundant as the FEA now asserts, this court might well find that it had no substantial impact. The subject of injection wells is not directly addressed, however, in the statute or its legislative history,[15] nor does the implementing regulation provide unambiguous guidance in this area. Moreover, contrary to the apparent assumption in appellant's argument, a finding that a rule has a substantial impact does not presuppose that the rule is inconsistent with the underlying statute or regulation. Were such a finding a necessary aspect of the test, then rules would be found procedurally defective only in those cases in which they could also be deemed substantively invalid. In the instant case, however, while I would find Ruling 1974-29 to have been issued in the absence of the required procedures and thus need not reach the question of its substantive validity, I note that a party challenging the substantive validity of an FEA regulation bears a heavy burden of persuasion.

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[14] Were this court to find that Ruling 1974-29 was contrary to the intent of Congress when it created the stripper well exemption, of course, the ruling would be substantively invalid, regardless of the procedures employed in issuing it. *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973). Appellees would have us so conclude, but I need not reach this point.

[15] Counsel for the FEA appear to concede the absence of clear guidance from Congress in this area when, addressing another issue at oral argument, he observed that the subject of injection wells was apparently not discussed when this legislation was enacted.

Appellant argues further that Ruling 1974-29 had no substantial impact because it merely stated what the agency's interpretation of the statute and regulation had always been, and it notes that there is no indication in the record that the FEA ever construed the statute or regulation to permit the counting of injection wells. While the agency may not have altered its position with the issuance of Ruling 1974-29, however, it seems fair to conclude that appellees were first informed of the agency's views in this regard when the ruling was published. The stripper well exemption was enacted, and the regulation promulgated, against a long background of federal regulation of stripper properties. In its administration of section 17 of the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 226, for example, the Department of the Interior ("DOI") has, since 1936, permitted the counting of injection wells as producing wells for purposes of qualifying for a reduced royalty to the government when the average daily production of a lease is 10 barrels or less per well.[16] Appellant argues that the rule under scrutiny in the instant case, issued pursuant to a different statute and intended to fulfill a different function, cannot be judged in accordance with the treatment accorded injection wells by the DOI. The point, however, is not that the FEA's treatment of injection wells should necessarily be governed by the treatment of such wells by the DOI, but rather that producers had reasonable grounds for assuming that injection wells would be included in the computation of average daily production per well, and that Ruling 1974-29, not the statute or the underlying regulation, was the first effective notice to producers—particularly those, like plaintiff-appellee Marathon Oil Company, which had been operating on federal lands under DOI regulations—that injection wells were not to be counted in connection with the stripper exemption.

Appellees contend that the FEA has itself conceded the legislative nature of Ruling 1974-29 by arguing before the

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[16] 30 C.F.R. § 221.49(b).

district court that, in evaluting the substantive validity of the rule, the court need only find a rational basis. Appellees assert that the rational basis test applies to legislative rules but that interpretative rules are subject to plenary judicial review, with the reviewing court free to substitute its judgment for that of the agency. The distinction between the scope of review for the two types of rules, however, is not as neat as appellees claim,[17] and this court has previously indicated that it considers the agency's interpretative rules worthy of considerable deference.[18] Such deference, however, imposes a concomitant obligation on the agency to issue rules having a substantial impact only after educating itself with regard to the wisdom of such rules. Shielded from the independent judgment of this court by the deference paid to its expertise, the agency should not at the same time deprive itself of comment from interested and experienced parties when it issues rules having substantial impact on those parties.

The Statutory Framework

I am fortified in my conclusion that the FEA should have conducted formal rulemaking procedures before issuing Ruling 1974-29 by the legislative foundations of the stripper well exemption and of the agency itself. In Section 4(e)(2)(C) of the EPAA, Congress delegated authority to the administering agency to promulgate regulations implementing the stripper well exemption, and the House-Senate Conference Report on the TAPAA stripper exemption directed the agency to promulgate the necessary regulations before the exemption became operative.[19] That same Conference Report indicated that the regulations to be promulgated

> shall be so designed as to provide safeguards against any abuse, overreaching or altering of normal patterns of

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[17] *See* K. Davis, *Administrative Law Treatise* § 5.05 (1958).

[18] *See Southern Union Production Co.* v. *FEA*, 569 F.2d 1147, 1152 (Em.App.1978).

[19] TAPAA Conf.Rep., n.5 *supra* at 2532.

> operations to achieve a benefit under this section which would not otherwise be available. Congress specifically intends that the regulations shall, among other things, prevent any "gerrymandering" of leases to average down high production wells with a number of low production stripper wells to remove the high production wells from price ceilings.[20]

Appellant has pointed to the above language in support of its contention that the stripper exemption was to be narrowly construed and that Congress did not intend to permit the counting of injection wells for purposes of qualifying for the exemption. Whether or not the Report would be capable of supporting the weight appellant would place on it, it does seem clear that Congress intended potential abuses to be prevented through issuance of regulations. Appellant's argument, therefore, that the counting of injection wells is merely another form of gerrymandering is an argument that ultimately undermines the procedural validity of Ruling 1974-29, in view of the expressed congressional preference for rulemaking in this area.

Subsequent to the passage and implementation of the stripper well exemption but prior to the issuance of Ruling 1974-29, Congress enacted the Federal Energy Administration Act ("FEAA"), 15 U.S.C. §§ 761, *et seq.*, which created the FEA. Section 7(i) of that Act, 15 U.S.C. § 766(i)[21] contains rulemak-

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[20] *Id.* at 2532-33.

[21] Section 7(i)(1)(A)-(C) of the FEAA was repealed by section 709(a)(2)(C) of the Department of Energy Organization Act, n.1, *supra*. Section 7(i)(1)(A)-(C) was, however, in effect when Ruling 1974-29 was issued.

ing provisions distinct from those of the APA, and this court has previously recognized the function of that section:[22]

> Congress recognized that the FEA's final judgment could only be as good as the information upon which it drew, and prescribed certain procedures—stricter than those of the [APA]—which would permit it to be educated by the most interested and therefore, hopefully, the most knowledgeable parties. [citation omitted.] The agency's discretion, and thus its latitude for promulgating unwise rules, was to be restrained through this deliberately prescribed process for meaningful comment. . . .

Shell Oil Co. v. *FEA*, 574 F.2d 512, 516 (Em.App. 1978).

Section 7(i) of the FEAA imposes upon the agency stricter rulemaking requirements than those contained in the APA. Section 7(i) requires the agency to publish the proposed rule itself in the Federal Register, whereas the APA merely requires an agency to publish a notice of proposed rulemaking. Section 7(i) narrows the APA's good cause exception to formal

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[22] *Amici curiae*, the Kansas Independent Oil & Gas Association and the National Stripper Well Association, contend that section 7(i) of the FEAA required formal rulemaking in connection with the issuance of any rule, as that term is defined in the APA, 5 U.S.C. § 551(4). Under such a construction, it is clear that even interpretative rules, normally exempt from the rulemaking requirements of section 553, would be subject to formal rulemaking, for section 551(4) defines rules in a broad sense to include legislative, interpretative, and several other types of rules, such as rules of internal agency organization and procedure. The breadth of such a reading of section 7(i), however, renders it improbable, for we cannot assume, in the absence of a clear expression of legislative intent, that Congress subjected the FEA to the burden of formal rulemaking in instances where such procedures have generally been recognized to be unnecessary. The reading suggested by appellant, that section 7(i) mandated the manner of giving notice of a proposed rule when such notice was otherwise mandated by the APA, seems a more reasonable construction.

rulemaking by permitting a waiver of notice and comment only where the agency finds that strict compliance would cause serious harm or injury to the public health, safety, or welfare. Section 7(i), moreover, requires the agency to afford interested parties an opportunity to present their views and arguments orally whenever a proposed rule "is likely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses."[23] The legislative history of section 7(i), furthermore, reflects the intention of Congress that the agency interpret generously its obligation to give notice and receive comment on proposed rules. Rep. Broyhill, who introduced the amendment to the FEAA that was to be enacted as section 7(i), remarked upon the impact that would flow from many of the actions taken by the agency and the importance that the agency act only after obtaining the benefit of comment from interested and knowledgeable persons.[24] The Conference Report similarly emphasized the importance of formal rulemaking:

> It is expected that the exception to the notice provision in paragraph (B) of section 7(i) of the conference substitute will be used very sparingly.
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> * * * * * *
>
> The conferees intend that if the Administrator is in doubt about the applicability of any of the standards provided in this section, he will resolve the doubt in favor of the fullest application of procedural safeguards.[25]

While I believe that the FEA's obligation to employ formal rulemaking procedures in its promulgation of Ruling 1974-29 can be discerned in the APA itself, without regard to the

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[23] 15 U.S.C. § 766(i)(1)(C).

[24] 120 Cong.Rec. 5459 (1974).

[25] FEAA Conf.Rep. No. 93-788, 93rd Cong., 2d Sess., [1974] U.S.Code Cong. & Admin. News, pp. 2972, 2977.

agency's specific statutory framework, it is clear that Congress intended the FEA to proceed with an extra measure of caution, a caution deemed advisable in the case of a new agency whose actions would necessarily have widespread impact on the economy. In view of the clear and substantial impact of Ruling 1974-29, on consumers as well as producers of crude oil, the agency was required to observe formal rulemaking procedures.[26]

Jurisdiction

Although the parties to this appeal did not address the issue of jurisdiction in their briefs, this court raised the matter at oral argument. Some concern was expressed, and some confusion on the part of counsel manifested, with regard to the reviewability of the ruling at issue. In *Atlantic Richfield Co.* v. *FEA*, 556 F.2d 542 (Em.App.1977), this court discussed the narrow circumstances under which interpretations issued by the FEA would be subject to judicial review. The factors there found to justify judicial review—the collateral estoppel effect on the persons who were both directly involved in the transaction and parties to the interpretation proceedings—would not appear to be present here, for, unlike the interpretations involved in that case, here there were no parties to the issuance of the ruling. The interpretations in *Atlantic Richfield* were issued pursuant to 10 C.F.R. Part 205 Subpart F, §§ 205.80—205.86. Interpretations issued pursuant to that portion of the regulations are arrived at on the basis of requests and information submitted by particular parties. Such interpretations app-

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[26] I am not unmindful of the findings of fact and conclusions of law reached by the district judge in *Grace Petroleum Corp.* v. *Department of Energy*, 456 F.Supp. 945 (W.D.Okl.1978). I would not follow *Grace Petroleum*, however, because there the court assumed the ruling was interpretative and gave inadequate consideration to the substantial impact of Ruling 1974-29, a consideration Congress clearly intended, as indicated by section 7(i) of the FEAA.

ly to and may be relied upon only by those persons to whom they are specifically addressed and other persons, directly involved in the same transaction or act, upon whom the FEA serves the interpretations.[27]

The ruling at issue here, however, is another creature entirely. It was issued pursuant to 10 C.F.R. Part 205 Subpart K, §§ 205.150-205.154. Such rulings, though subject to modification or recission like Subpart F interpretations, are of general applicability, and may be relied upon by anyone.[28] Ruling 1974-29 presents a clear legal issue, depends upon no shifting factual circumstances, and provides for no further administrative inquiry.[29] It is the kind of agency action traditionally subject to judicial review, see *National Automatic Laundry and Cleaning Council* v. *Shultz*, 143 U.S.App.D.C. 274, 443 F.2d 689 (1971) (cited in *Atlantic Richfield Co.* v. *FEA*, *supra*, 556 F.2d at 553 n.27), and such rulings have been reviewed by this court in the past. *See, e.g., Southern Union Production Co.* v. *FEA*, 569 F.2d 1147 (Em.App.1978).

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[27] 10 C.F.R. § 205.85(c).

[28] 10 C.F.R. § 205.150.

[29] 10 C.F.R. § 205.154.

APPENDIX E

In re the DEPARTMENT OF ENERGY STRIPPER WELL EXEMPTION LITIGATION.

No. 378.

Judicial Panel on Multidistrict Litigation.

June 29, 1979.

Before MURRAY I. GURFEIN, Chairman, and EDWIN A. ROBSON, STANLEY A. WEIGEL,* ANDREW A. CAFFREY,* ROY W. HARPER, and CHARLES R. WEINER, Judges of the Panel.

OPINION AND ORDER

PER CURIAM

This litigation consists of nineteen actions pending in four districts as follows:

District of Kansas	11 actions
Northern District of Texas	6 actions
Central District of California	1 action
District of Delaware	1 action

The same United States Department of Energy (DOE) regulation is challenged in each action in this docket.

In a number of different statutory enactments, Congress has exempted from price controls the first sales of domestic crude oil produced and sold from a property whose maximum average daily production of crude oil per well does not exceed ten barrels. A well whose output does not exceed ten barrels per day is a "stripper" well, and the price control exemption is

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*Judges Weigel and Caffrey took no part in the decision of this matter.

colloquially referred to as the "stripper well exemption." In December, 1974, the general counsel of the Federal Energy Administration (a predecessor of DOE) issued Ruling 1974-29 which held that certain wells denominated "injection wells"[1] were not wells for the purposes of determining whether the average daily production of a property was ten barrels or less per well. Each action in this docket is brought against DOE, the Federal Energy Administration and/or their officials by crude oil producers that own marginally producing properties which would qualify under the stripper well exemption from price controls if injection wells were counted as oil wells.

The first three actions in this litigation were filed in the District of Kansas and assigned to the Honorable Frank G. Theis. Plaintiffs in these actions sought, *inter alia*, 1) a declaratory judgment to the effect that Ruling 1974-29 was invalid because the Ruling was in contravention of federal energy laws, had been adopted without compliance with the Administrative Procedure Act (APA), and/or was adopted in a manner so arbitrary and capricious as to deny plaintiffs due process of law; and 2) injunctive relief enjoining the enforcement of Ruling 1974-29 pending the court's determination of the Ruling's validity. On January 26, 1978, Judge Theis held that Ruling 1974-29 was procedurally invalid because of the failure of the Federal Energy Administration to comply with the notice and hearing requirements of the APA, and he enjoined the defendants from enforcement of Ruling 1974-29 against the plaintiffs. On October 31, 1978, the Temporary Emergency Court of Appeals reversed Judge Theis's ruling. The appellate court held that Ruling 1974-29 was an "in-

[1] An injection well is a well through which water, natural gas or other material is injected into the ground, thereby creating pressure in the geological formation that forces crude oil out from another well.

terpretative," rather than "legislative," rule, and was therefore exempt from the notice and comment rulemaking requirements of the APA. The actions were remanded to Judge Theis for a determination of whether the Ruling was invalid on one of the other grounds advanced by plaintiffs. *Energy Reserves Group, Inc.* v. *Department of Energy*, 589 F.2d 1082 (Em.App.1978).

The eight other Kansas actions were filed subsequent to Judge Theis's January, 1978 decision and were apparently instituted as a result of the DOE's decision to continue to apply Ruling 1974-29, pending the outcome of DOE's appeal of Judge Theis's decision, to properties of producers not party to the three earlier filed Kansas actions. In these eight other actions plaintiffs also seek a declaration of the Ruling's invalidity and an injunction against the DOE's enforcement of the Ruling against them. Ten of the eleven Kansas actions are now consolidated before Judge Theis. The eleventh Kansas action *(Cities Service)* was reassigned to the Honorable Wesley E. Brown after Judge Theis recused himself from presiding in the action. Judge Brown has granted plaintiff's motion for a preliminary injunction against DOE and has stayed all further proceedings in that action until a final decision is reached in the actions before Judge Theis.

The actions in Texas, Delaware, and California were filed after Judge Theis's January, 1978 decision, and plaintiffs there too seek, *inter alia*, a declaration of Ruling 1974-29's invalidity and injunctive relief against the DOE's continued application of the Ruling. The Texas actions have been consolidated for pretrial purposes.

Presently before the Panel is a motion by Union Oil Company of California (Union), plaintiff in the California action, to centralize pursuant to 28 U.S.C. § 1407 the actions in this docket in the District of Kansas for coordinated or consolidated

pretrial proceedings.[2] DOE supports centralization.[3] Plaintiffs in the Delaware action and plaintiffs in five of the six Texas actions do not oppose transfer of the California action to the District of Kansas, but they do oppose inclusion of their respective actions in centralized proceedings. Plaintiffs in the Kansas actions do not oppose centralization under Section 1407.

We find that the nineteen actions in this litigation raise common questions of fact and that centralization under Section 1407 of all actions in the District of Kansas will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.

Opponents to centralization of some of the actions argue that the predominating shared questions among actions in this docket are questions of law rather than fact, and that therefore the statutory criteria for Section 1407 transfer have not been met. Opponents urge that voluntary cooperation among the

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[2] Union's motion was somewhat ambiguous concerning whether it included the Delaware and Texas actions. Union's motion referred specifically only to transfer of the California action to the District of Kansas, but the Delaware and Texas actions were listed on Union's Schedule of Actions, and the counsel in those actions were served by Union. In light of these circumstances, the Delaware and Texas actions were included in the Panel's Notice of Hearing. Thus, in any event, the Delaware and Texas actions are properly before us under the authority granted the Panel pursuant to 28 U.S.C. § 1407(c)(i) to act on its own initiative. We note that the parties, both in their briefs and at oral argument, addressed the question of centralizing under Section 1407 all the actions listed on the Notice of Hearing.

[3] DOE has informed the Panel of ten other actions, filed in the District of Delaware, the Eastern District of Illinois, the District of Kansas, the Eastern District of Michigan, the Eastern District of Oklahoma, the Northern District of Oklahoma, the Northern District of Texas, or the Southern District of Texas, that allegedly also challenge the validity of Ruling 1974-29. These ten actions will be treated as potential tag-along actions. *See* Rules 10(d), 1, 9 and the remaining portions of 10, R.P.J.P.M.L., 78 F.R.D. 561, 562, 567-68 (1978).

parties, counsel and courts regarding any common issues or discovery is a preferable alternative to transfer because the Kansas actions and, to a lesser extent, the Texas actions are far advanced and would be subjected to lengthy delays in the event of transfer, while receiving no substantial benefits. Opponents in some of the Texas actions also argue that transfer of their actions is inappropriate because of the presence of unique issues in those actions.

We find these arguments unpersuasive. All actions in this litigation share questions of fact and law arising under a complicated series of statutes and reglations relating to the highly technical engineering and geological problems that attend secondary recovery of oil that is nearing a state of depletion. Specific common questions of fact relate to: 1) the role played by injection wells in the secondary recovery process; 2) the importance of secondary recovery production in general, and the effect of Ruling 1974-29 on the premature abandonment of marginal wells and the concomitant loss of known recoverable reserves; and 3) the knowledge of the various federal officials who drafted Ruling 1974-29 regarding the state of the art in the industry, and how those officials allegedly acted arbitrarily and capriciously. Transfer is thus necessary in order to prevent duplicative discovery, eliminate the possibility of conflicting pretrial rulings, and conserve the efforts of the parties, the witnesses and the judiciary. While voluntary coordination of discovery efforts among parties and their counsel is always commendable, transfer of these actions to a single district under Section 1407 will ensure the streamlining of discovery and all other pretrial proceedings as well. *See In re Ascot Oils, Inc. Securities Litigation*, 433 F.Supp. 1118, 1120 (Jud.Pan.Mult.Lit.1977). Any pretrial proceedings regarding any issues unique to any action, claim or property may be scheduled by the transferee court to proceed concurrently with pretrial proceedings on the common issues, and thereby all aspects of the litigation can proceed expeditiously. *See In re Capital Underwriters, Inc. Securities Litigation*, 464 F.Supp. 955, 960 (Jud.Pan.Mult.Lit.1979).

On the basis of the record before us, no action in this litigation appears sufficiently advanced to warrant its exclusion from transfer. While all actions may not be at the same stage of pretrial, we conclude that all actions in this litigation will benefit from transfer under Section 1407. We note that if and when an action or claim is, in fact, ready for trial, or otherwise ready for remand because the transferee judge finds that the centralized pretrial proceedings pertaining to that action or claim are completed, the transferee judge may suggest to the panel that the Panel remand the action or claim to its transferor district. *See* 28 U.S.C. § 1407(a); Rule 11(c)(ii), R.P.J.P.M.L., 78 F.R.D. 561, 569 (1978). *See, e.g., In re A. H. Robins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation*, 453 F.Supp. 108 (Jud.Pan.Mult.Lit. 1978). And, of course, the transferee judge has power to provide that any discovery heretofore completed in any action may be made applicable to all actions by utilizing the procedures recommended in the *Manual for Complex Litigation*, Parts I and II, §§ 3.11 (rev. ed. 1977).

The concern raised by opponents to transfer over the impact that participation in Section 1407 proceedings will have on the conduct of the actions to which they are parties is unwarranted. The transferee judge also has the power to provide that plaintiffs in the actions in this docket need not participate in discovery or other pretrial proceedings unrelated to their respective actions. *See id.* at Parts I and II, §§ 2.31. And we are confident that prudent counsel in all actions can apportion their workload and otherwise combine forces to minimize inconveniences and to effectuate an overall savings of cost and time. *See id.* at Part I, §§ 1.90-1.93.

We conclude that the District of Kansas is the appropriate transferee forum for this litigation. The majority of the actions are already pending there. More importantly, Judge Theis has had an opportunity to become familiar with the legal and technical questions in this litigation, and is therefore in the best position to supervise the pretrial proceedings in this litigation to their just and expeditious termination. *See In re Griseoful-*

vin Antitrust Litigation, 395 F.Supp. 1402, 1403 (Jud.Pan.Mult.Lit.1975). Since this litigation is nationwide, the geographically central location of the District of Kansas also commends its selection as the transferee district. *See In re A. H. Robins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation*, 406 F.Supp. 540, 543 (Jud.Pan.Mult.Lit.1977).

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the actions listed on the following Schedule A and pending in districts other than the District of Kansas be, and the same hereby are, transferred to the district of Kansas and, with the consent of that court, assigned to the Honorable Frank G. Theis for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A.[4]

SCHEDULE A

Central District of California

Union Oil Company of California v. *The Department of Energy, et al.*, C.A. No. 78-1487-HP

District of Delaware

Coastal State Gas Corp., et al. v. *The Department of Energy, et al.*, C.A. No. 78-133

Northern District of Texas

Exxon Corp. v. *The Department of Energy, et al.*, C.A. No. CA3-78-0244-W

Continental Oil Co. v. *The Department of Energy et al.*, C.A. No. CA3-78-0321-W

Hunt Oil Co. v. *The Department of Energy, et al.*, C.A. No. CA3-78-0325-W

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[4] Our ruling, of course, does not upset the assignment of the *Cities Service* action to Judge Brown.

Prosper Energy Corp. v. *The Department of Energy, et al.*, C.A. No. CA3-78-0651-W

Roy L. Hunt, etc. v. *The Department of Energy, et al.*, C.A. No. CA3-78-1487-W

Crystal Oil Company, et al. v. *The Department of Energy, et al.*, C.A. No. CA3-79-0059-W

District of Kansas

Braden-Zenith, Inc., et al. v. *The Federal Energy Admin., et al.*, C.A. No. 76-429-C6

Sierra Petroleum Co., et al. v. *The Federal Energy Admin., et al.*, C.A. No. 77-1087

Energy Reserves Group, Inc., et al. v. *The Federal Energy Admin., et al.*, C.A. No. 77-1146

Mobil Oil Corp., et al. v. *The Department of Energy, et al.*, C.A. No. 78-1070

Robert Johnson and Phillips Petroleum Corp. v. *The Department of Energy, et al.*, C.A. No. 78-1140

Cities Service Co. and L. B. McCune v. *The Department of Energy, et al.*, C.A. No. 78-1145

Stelbar Oil Corp. and Standard Oil Co., Inc., et al. v. *The Department of Energy, et al.*, C.A. No. 78-1176

Robert Dale Brandenburg and Texaco, Inc. v. *The Department of Energy, et al.*, C.A. No. 78-1230

George W. Waite and Amoco Production Co. v. *The Department of Energy, et al.*, C.A. No. 78-1357

Otis Peavey, et al. and Sun Oil of Delaware v. *The Department of Energy, et al.*, C.A. No. 78-1410

Howard Stout, et al. and Gulf Oil Corp. v. *The Department of Energy, et al.*, C.A. No. 78-1513

APPENDIX F

CHARLES W. DUNCAN, Secretary of Energy, and the United States Department of Energy,
Petitioners,

v.

The Honorable FRANK G. THEIS, Chief Judge of the United States District Court for the District of Kansas,
Respondent.

No. 10-22.

Temporary Emergency Court of Appeals.

Argued Nov. 6, 1979.
Decided Dec. 27, 1979.

Before CHRISTENSEN, BECKER and ZIRPOLI, Judges.

CHRISTENSEN, Judge.

The United States Department of Energy and the Secretary of Energy have petitioned this court for a writ of mandamus, pursuant to 28 U.S.C. § 1651 and Rule 21 of the Federal Rules of Appellate Procedure, for the purpose of directing the Honorable Frank G. Theis, Chief Judge of the United States District Court for the District of Kansas to execute the mandate of this court in accordance with its decision in *Energy Reserves Group, Inc.* v. *Department of Energy*, 589 F.2d 1082 (Em.App.1978)[1] Petitioners assert that the respondent Judge

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[1] This decision reversed the holding of the respondent judge in consolidated cases designated *Energy Reserves Group, Inc.* v. *Department of Energy* and reported as such in 447 F.Supp. 1135 (D.Kan.1978) that Federal Energy Administration Ruling 1974-29 (39 Fed.Reg. 44414, Dec. 24, 1974), which interpreted the "stripper well exemption" as excluding injection wells from the "well count," was void because it was published without utilizing the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553(b).

had declined to give effect to the court's decision and judgment and has treated as subject to relitigation upon remand issues that have been settled conclusively by this court. It is particularly charged that the district court has refused to dissolve a preliminary injunction entered in violation of our decision, thus continuing to restrain the Department of Energy from enforcing its ruling and regulations and permitting the plaintiffs before the lower court to avoid with impunity valid price controls and to thereby compound the current escalation of energy costs of the consuming public, has entered additional preliminary injunctions with the same effect and has ordered extensive discovery on the very points resolved as matters of law by this court.[2]

The plaintiffs in the district court, responding to the petition, take the position that this court's decision on appeal settled only the "procedural validity" of the administrative ruling in question, but that the "substantive validity" of such ruling and that of the regulation which it interpreted has not been ruled upon, and that the proceedings in the lower court after remand have been confined to the issues not decided by this court.[3]

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[2] It is the government's position that while the procedural issue "unquestionably was the immediate issue before the court, it is equally clear that because of the arguments advanced by respondents and the interdependence of the issues, the court in the course of its exegesis necessarily addressed the controlling [substantive] issues in the case. It is these pronouncements that effectively foreclose contentions that respondents now raise on remand relating to reasonableness of the interpretation and its consistency with the state statute and regulations." (Petitioners' reply memo.)

[3] Additionally, plaintiffs in numerous cases now consolidated for further pretrial proceedings with the appealed cases following the filing of our mandate also assert that even the "procedural validity" of the administrative ruling has not yet been established as to them. The consolidation and transfer of these additional cases to Judge

Judge Becker's prevailing opinion together with Judge Zirpoli's dissenting opinion in *Energy Reserves Group, supra*, have so comprehensively and accurately outlined the history of the statutory stripper well exemption and related administrative regulations and rulings as to render any further restatement here unnecessary. But apparently it will be helpful to review briefly the issue initially presented to this court, the dimensions of our consideration of that issue and what was decisively agreed upon in the opinions in arriving at the judgment and mandate of this court.

Prior to the district court's ruling, the parties had entered into a stipulation consolidating the three Kansas cases for a ruling of the district court on three issues:

> 1. Whether Ruling 1974-29 . . . is arbitrary, unreasonable or in conflict with the Trans-Alaska Pipeline Authorization Act, 43 U.S.C §§ 1651 *et seq.* and the Emergency Petroleum Allocation Act of 1973 as amended, 15 U.S.C. §§ 751 *et seq.*
>
> 2. Whether ruling 1974-29 was issued in compliance with the APA, 5 U.S.C. § 553.
>
> 3. If Ruling 1974-29 is valid, whether the ruling may be applied to the plaintiffs' sales of crude oil prior to December 24, 1974, the date on which the ruling was issued by the FEA.

The district court's memorandum decision, *Energy Reserves Group, Inc.* v. *Department of Energy*, 447 F.Supp. 1135 (D.Kan.1978), was confined to a determination of the issue of procedural legality of the ruling. The court expressly stated that in view of its conclusion that the ruling was void for want of rule making procedures under the APA, it "will not rule upon the issue of whether Ruling 1974-29, even it if were legally enacted, would be arbitrary, unreasonable, or in conflict with

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Theis for further pretrial proceedings was ordered by the Judicial Panel on Multidistrict Litigation in June, 1979. *In re Dept. of Energy Stripper Well Exemption Litigation*, 472 F.Supp. 1282 (1979).

statutory authority." 447 F.Supp. at 1150. It was also stated: "Having found Ruling 1974-29 void and ineffective to affect the rights of plaintiffs herein, the Court need not address plaintiffs' third principal contention as to retroactive application of such Ruling." 447 F.Supp. at 1151.

The ultimate issue on appeal was appropriately defined by Judge Becker, 589 F.2d at 1085, as follows:

> Whether the District Court erred in holding that Federal Energy Administration ("FEA") Ruling 1974-29 (39 F.R. 44414, Dec. 24, 1974), which interpreted the stripper well exemption as excluding injection wells from the "well count" for purposes of applying the exemption, is null and void and without effect because it was published without utilizing the notice and comment provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b).

The prevailing opinion then comprehensively analyzed and discussed all aspects of this problem, including statutory underpinnings, reasonableness of the ruling in question and its conformance to the duly noticed and issued regulations of which it purported to be an interpretation, and concluded, among other things, that the ruling had no significant impact to render it legislative in character, if indeed the rule of impact bore upon this problem, because the regulation and the interpretation said essentially the same thing.

The prevailing opinion of this court concluded: "In each of these actions the judgment is reversed and the action remanded for further proceedings consistent with this opinion." 589 F.2d at 1101.

Judge Christensen concurred "in the result reached above and with most of Judge Becker's analysis and reasoning," specified the points of Judge Becker's analysis and reasoning concerning which he was "troubled", none of which involved any question touching upon Judge Becker's view that the basic regulation itself limited the well count to wells which directly produced or yielded petroleum, specifically agreed with Judge Becker that there was no significant impact operating against the ruling in question, and restated with the same effect that

the administrative ruling was interpretative and not legislative in view of the same meaning reflected in the duly noticed regulation on which the interpretation was based.

Judge Zirpoli dissented on the ground that the ruling in question, as distinguished from the regulation which it purported to interpret, was legislative in character and had such significant impact as to mandate compliance with § 553(b) of the APA, and that is all that he decided.

While the unsuccessful appellees requested extensions of time to seek rehearing and rehearing en banc, presumably preliminary to a petition for certiorari, their request was withdrawn and they elected not to seek review in the Supreme Court by certiorari.

In sum, the present situation is that the consistency of Ruling 1974-29 with the APA has been finally established and, in connection with the ruling on the issue before the court and particularly in dealing with the question of substantial impact, both judges concurring in the result clearly indicated the majority view that the ruling in question did not represent any substantial departure from the meaning of the regulation, and for this reason had no substantial impact as in interpretative ruling.[4] Whether the regulation itself was within the authority of the FEA to promulgate, despite its conceded procedural

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[4] Judge Becker expressly held that "Ruling 1974-29 is a reasonable interpretation of the term 'average daily production' as used in § 406 of TAPAA, § 4(e)(2)(A) of EPAA, and in 10 C.F.R. § 210.32(b), found to be valid by the district court." 589 F.2d at 1098. Judge Christensen clearly stated his agreement that no significant impact operated against the ruling in question because "a holding that 'a well which produces crude petroleum' means, as contemplated by the properly adopted and subsisting regulations and in view of the seminal statute, a well that produces or yields such petroleum directly rather than one which may be utilized as part of a system to obtain indirectly crude petroleum from a producing well, seems essentially the sort of an interpretation that must have been intended by the APA exception to the rulemaking requirement." 589 F.2d at 1103.

regularity, or whether it was arbitrary or capricious does not so clearly appear from a consideration of the decision as a whole.[5]

The unjustified unwillingness of the government on the one hand to acknowledge this differentiation in its effort to block all further proceedings before Judge Theis by way of discovery or otherwise, and on the other hand the mistaken position of some of the plaintiffs that our decision essentially settled nothing, or at most only the issue of "procedural validity" as affecting the parties involved in the appeal, may account in some measure for the difficulties the lower court and the parties now profess to see within our mandate. Yet, it was rendered clear during the oral argument on the petition for mandamus now before us that the decision of this court set at rest the question of the compliance of the ruling in question with the APA because it

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[5] As pointed out by Judge Becker at pages 1087-88 of the prevailing opinion, the statutory treatment of the stripper well exemption has closely followed the wording of § 4(e)(2)(A) of the Energy Petroleum Allocation Act of 1973 reading as follows: "The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well." The regulation contained in 10 C.F.R. § 210.32(b) described the phrase "average daily production" to be the average daily production computed by dividing: "the qualified maximum total production of crude oil . . . produced from a property, divided by a number equal to the number of days in the year times the number of wells that produced crude oil . . . from that property in that year. . . ." It is arguable that the statutory emphasis upon "average daily production" of a lease and the lack of any more direct linkage of the definition of a "well" for the purpose of computing average daily production," represents a difference in the degree of definiteness by which injection wells are precluded as part of the "count" when examined against the regulation providing that wells to be so counted must "produce crude oil." In any event, Judge Christensen, unlike Judge Becker, did not specifically comment on the statute except as a reference highlighting the correspondence of the ruling and the regulation.

was simply a restatement of the meaning and effect of the regulation on which it was based.[6]

It may well be beyond the issues thus clearly resolved by this court's decision on appeal that in line with Judge Becker's persuasive analysis and reasoning and as he has suggested, 589

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[6] Judge Zirpoli: Let's assume that Judge Theis proceeds and allows you the discovery you request and the discovery procedure is finally completed. Do you consider or say for one moment that you may relitigate the ruling of this court on the procedural aspects of the rule?

> Mr. Kennedy [counsel for the appellees in the *Energy Reserves Group* appeal and main spokesman for the respondents in this proceeding]: No your Honor, we do not—

Judge Zirpoli: Do you say that Judge Theis may for one moment reconsider this ruling?

Mr. Kennedy: Certainly not as far as—

Judge Zirpoli: The argument is made here by government counsel that that is—that that appears one of the objectives that you have in mind.

Mr. Kennedy: No, that is absolutely incorrect. We have said—we say now to your Honors that we realize that we are bound by this court's determination of the procedural invalidity [sic] of ruling 74-29. None of your discovery requests—and there are 24 questions in this case—[apparently numerous other requests on behalf of added plaintiffs have been allowed by the district court] none of those went to the procedural validity or procedural context of 1974-29. None went to the substantial impact test. We realize that we are bound and we are not—

Judge Zirpoli: What about the interrogatories on substantial impact?

. . . . .

Mr. Kennedy: We are not engaging in that.

Judge Zirpoli: You are not engaging in any [of that] whatsoever?

Mr. Kennedy: No we are not your Honor. . . .

Judge Zirpoli: Not even for the purpose of determining that the regulation exceeded the authority of Congress?

F.2d at 1092, the administrative regulation and its interpretation constituted not only a reasonable construction of the statute as well, but in addition "may be the construction ultimately preferred by the courts." But since our decision did not definitely resolve any statutory problem, there is presently no basis to cut off further proceedings in the district court except for the mandated judgment sought by the petitioners.

We deny the government's petition for a writ of mandamus because of the narrow reach of this extraordinary remedy,[7] unresolved issues as to whether the ruling in question is arbitrary, capricious or unreasonable in the light of, or is in conflict with, or is beyond the authority granted by controlling statutory provisions,[8] the province and duty of the district court, consistent with the mandate of this court and the doctrine of *stare decisis*, to exercise its reasonable discretion in determining interlocutory proceedings, record making and

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Mr. Kennedy: Oh yes we are on that . . .

Judge Zirpoli: Oh, well then you are, that's what I wanted to know. You are going to make some—such discovery insofar as it relates to substantial impact?

Mr. Kennedy: Insofar as whether or not the regulation exceeded the authority of Congress, yes. But not so far as to whether or not the ruling had a substantial impact. We think that that issue has been foreclosed by this court's opinion.

[7] *Kerr* v. *United States District Court for the Northern District of California*, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976); *Will* v. *United States*, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967); *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106 (1953); *Ex parte Fahey*, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947); *State Farm Mut. Auto. Ins. Co.* v. *Scholes*, 601 F.2d 1151 (10th Cir. 1979).

[8] *See Singleton* v. *Wulf*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *but compare Hormel* v. *Helvering*, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941).

judgments in the first instance,[9] the consolidation and addition of parties plaintiff following the determination of the prior appeal and the issuance of the mandate of this court, and our confidence that Judge Theis upon this clarification of what we thought was manifest in our prior decision will not transgress the fair meaning and effect of our mandate or proper application of the doctrine of *stare decisis*.[10] A fragmentary or incomplete record with respect to claimed abuse of court processes, or interspersion with predominantly courteous, circumspect and commendable probing by the trial judge in his colloquies with counsel of faintly recalcitrant observations,[11] do not warrant the action now requested by petitioners.

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[9] *American Express Warehousing Ltd.* v. *TransAmerica Ins. Co.*, 380 F.2d 277 (2d Cir. 1967); *Paramount Film Distributing Corp.* v. *Civic Center Theater*, 333 F.2d 358 (10th Cir. 1964); *Chemical and Industry Corp.* v. *Druffel*, 301 F.2d 126 (6th Cir. 1962); *Byram Concretanks, Inc.* v. *Meany*, 286 F.2d 170 (3d Cir. 1961). *Cf. Standard Oil Co.* v. *DOE*, 596 F.2d 1029 (Em.App.1978).

[10] We had thought that the factual basis for our earlier decision was evident from the circumstances we cited as relevant, and its legal basis equally so from the principles we identified as controlling. By the same token, we believed we had furnished the District Court with unequivocal standards which successor counsel . . . would have to meet.

> . . . We accordingly grant the petition, but in the belief that issuance of a formal writ is unnecessary. We trade instead upon our confidence that without more the District Court will now take action to rectify the error which gave birth to the present proceeding.

Yablonski v. *United Mine Workers of America*, 147 U.S.App.D.C. 193, 196, 454 F.2d 1036, 1039 (D.C.Cir.1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1609, 31 L.Ed.2d 816 (1972).

[11] I'm bound by which the other court says. I don't necessarily agree with what the majority have said, but I disagree very strongly. I think they missed the boat. . . . [Tr. of Prel. Pretrial Conf., Dec. 1, 1978.] I'm not going to capitulate so easily. . . . And I would like to see the matter adjudicated myself, by the Supreme Court eventually—and that is probably where it will get to. . . . And I do agree, I think, that the permanent injunc-

In so withholding the peremptory writ we do not mean to be understood as accepting or suggesting that the binding meaning and effect of the mandate is limited to express or formally mandatory language as distinguished from its reasonable meaning, spirit and effect in context of the decision agreed upon by the majority of the judges of the court,[12] that our

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tions have to be dissolved, in view of TECA's opinion, but that doesn't foreclose me from turning right around and entering—which I think I'm going to do—another preliminary injunction, on the basis of the probable invalidity of the statute [sic] in my opinion. . . . I'm obligated by *stare decisis* in the respect that I have to have—from the other courts—to follow that. So, I think they're going to get a piece of the loaf, but I don't follow their other reasoning. . . . There are other aspects in the opinion, as I've said before, in the division that was in the, among the TECA judges that—even by Judge Christensen—that he didn't buy everything that Judge Becker—you really had three judges sounding off—and we've got Judge Eubanks down in the District of Oklahoma, and Woodward in Texas, and myself here, and I think the least that can be said is that there is a division of judicial opinion [Tr. of pretrial hearing February 1, 1979].

[12] *See Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425, 98 S.Ct. 702, 54 L.Ed.2d 659 (1978).

> A trial court "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding this case," and it is well settled that mandamus lies to rectify the deviation.

Yablonski, supra, 147 U.S.App.D.C. at 195, 454 F.2d at 1038.

> [T]here would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members.

United States v. *Camou*, 184 U.S. 572, 574, 22 S.Ct. 505, 506, 46 L.Ed. 694 (1902).

> A mandate is completely controlling as to all matters within its compass, but on remand the trial court is free to pass upon any issue which was not expressly or impliedly disposed of on appeal. Since, however, a final judgment upon the merits concludes the

decision, even though involving the main, concurring and dissenting opinions, is not mandatory and binding upon remand in the light of context, spirit, unity of opinion and reasonable effect,[13] that as to refiners who were not parties to the appeal, but who are now before the same court in essentially the same position as those who were, the doctrine of *stare decisis* is not controlling upon the district court,[14] nor that interlocutory injunctions or discovery programs inconsistent with a mandate

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> parties as to all issues which were or could have been decided . . . it is obvious that such a judgment of this court on appeal puts all such issues out of the reach of the trial court on the remand of the case. That court is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of this court deciding the case . . . If a judgment or decree of this court which disposes of a case upon the merits has become final, no purpose can be served by considering whether it is right or wrong. A judgment which is wrong, but unreversed, is as effective as a judgment which is right. [Citations omitted.]

Thornton v. *Carter*, 109 F.2d 316, 320 (8th Cir. 1940).

Mandamus will lie when the lower court disobeys, mistakes or misconstrues the meaning of a decision on appeal upon remand. *General Atomic Co.* v. *Felter*, 436 U.S. 493, 98 S.Ct. 1939, 56 L.Ed.2d 480 (1978). *Vendo Co.* v. *Lektro-Vend Corp.*, *supra*.

[13] A plurality of opinions of course does not mean that there is not a binding decision of the court. *Vendo Co.* v. *Lektro-Vend Corp.*, *supra*; *Benton* v. *Kansas City*, 237 Mo.App. 385, 168 S.W. 476, 478 (1943).

[14] A previous opinion deciding contentions identical in facts, law and application with those in the instant case should be followed on the principle of *stare decisis*. 21 C.J.S. § 186(f); *U.S.* v. *Egelak*, 173 F.Supp. 206 (D.Alas.1959).

Where two cases are consolidated in the trial court, and the records on the two appeals are substantially the same, a decision of the Supreme Court on questions presented on one of the appeals will be regarded as a ruling precedent for determining similar questions presented on the other appeal. *Sinker-Davis Co.* v. *Indianapolis*, 177 Ind. 417, 94 N.E. 886 (1911).

or repugnant to a proper application of the doctrine of *stare decisis* are beyond the reach of a peremptory writ or other remedy.[15]

Under existing circumstances the writ is denied.

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[15] We are concerned with suggestions in the record of the nature and extent of discovery being sought before the district court for the apparent purpose of further attacking the "procedural validity" of the ruling in question and for the probing of the mental processes of officials connected with it. Our withholding of the writ as inappropriate on the present record does not rule out possible consideration of an appeal or other remedy where abuse through patently unauthorized discovery in view of an appellate mandate becomes so egregious as to threaten agency functioning. *See Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Cf. Dyke* v. *Gulf Oil Corp.*, 601 F.2d 557 (Em.App.1979).

APPENDIX G

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 10-39

ENERGY RESERVES GROUP, INC., *et al.*,
Plaintiffs-Appellees,

v.

DEPARTMENT OF ENERGY, *et al.*,
Defendants-Appellants.

Before GRANT, LARSON and LACEY, Judges.

JUDGMENT

This cause came to be heard on the record on appeal from the United States District Court for the District of Kansas and was argued by counsel.

In consideration whereof, IT IS ORDERED that the judgment of the District Court is reversed and the case is remanded with instructions to enter judgment for the defendants-appellants.

FOR THE COURT:
DONNA M. BOLD, Clerk
/s/ By: PATRICIA L. KROSEL
Patricia L. Krosel
Chief Deputy Clerk

July 29, 1982
(District Court No. MDL No. 378)

APPENDIX H

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 10-39

ENERGY RESERVES GROUP, INC., *et al.*,
Plaintiffs-Appellees,

v.

DEPARTMENT OF ENERGY, *et al.*,
Defendants-Appellants.

Before GRANT, LARSON and LACEY, Judges.

ORDER

Upon consideration of Appellees' petition for rehearing and suggestion for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition for rehearing is DENIED.

IT IS FURTHER ORDERED that the suggestion for rehearing *en banc* is DENIED. The mandate is to issue September 17, 1982.

FOR THE COURT:
DONNA M. BOLD, Clerk
/s/ By: STEPHEN M. MANCUSO
Stephen M. Mancuso
Deputy Clerk

September 10, 1982

APPENDIX I

STATUTES, REGULATIONS, AND RULING INVOLVED

Section 406 of the Trans-Alaska Pipeline Authorization Act, Pub.L. 93-153, 87 Stat. 577, 590, provided:

> (a) The first sale of crude oil and natural gas liquids produced from any lease whose average daily production of such substances for the preceding calendar month does not exceed ten barrels per well shall not be subject to price restraints established pursuant to the Economic Stabilization Act of 1970, as amended, or to any allocation program for fuels or petroleum established pursuant to that Act or to any Federal law for the allocation of fuels for petroleum.
>
> (b) To qualify for the exemption under this section, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.
>
> (c) The agency designated by the President or by law to implement any such fuels or petroleum allocation program is authorized to conduct inspections to insure compliance with this section and shall promulgate and cause to be published regulations implementing the provisions of this section.

Section 4(a) and (e)(2) of the Emergency Petroleum Allocation Act of 1973, Pub.L. 93-159, 87 Stat. 627, 629, 632, provided:

> (a) Not later than fifteen days after the date of enactment of this Act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (f), such regulation shall take effect not later than fifteen days after its promulgation. Except as provided in subsection (e) such regulation shall apply to all crude oil, residual fuel oil and refined petroleum products produced in or imported into the United States.

* * * * *

(e)(2)(A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

(B) To qualify for the exemption under this paragraph, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

(C) Any agency designated by the President under section 5(b) for such purpose is authorized to conduct inspections to insure compliance with this paragraph and shall promulgate and cause to be published regulations implementing the provisions of this paragraph.

Section 401 of the Energy Policy and Conservation Act, Pub.L. 94-163, 89 Stat. 871, 946, in pertinent part provided:

Subsections (d), (e), and (g) of section 4 of the Emergency Petroleum Allocation Act of 1973 are repealed . . . .

Section 406 of Public Law 93-153 is repealed.

Section 121 of the Energy Conservation and Production Act, Pub.L. 94-385, 90 Stat. 1125, 1132-33, amended section 8 of the Emergency Petroleum Allocation Act of 1973 by adding the following subsection:

(i)(1) The first sale price of stripper well crude oil shall be exempt from the regulation promulgated under section 4 of this Act as amended pursuant to the requirements of this section. For the purpose of this section, the President shall include in the computation of the actual weighted average first sale price for crude oil produced in the United States in any month subsequent to August 1976 the actual volume of stripper well crude oil produced in the United States in such subsequent month and such actual volume shall be deemed to have been sold at a first sale price equal to $11.63 per barrel plus the difference between the actual weighted average first sale price in August 1976, for crude oil, other than stripper well crude oil, produced in the United States, and the actual average first sale price in such subsequent month of all classifications of crude oil, other than stripper well crude oil, produced in the United States, weighted as if each such

classification were produced in such subsequent month in the same proportion as such classification, or the most nearly comparable classification which existed on August 1, 1976, was produced in August 1976.

(2) For the purposes of this subsection, "stripper well crude oil" means crude oil produced and sold from a property whose maximum average daily production of crude oil per well during any consecutive 12-month period beginning after December 31, 1972, does not exceed 10 barrels.

(3) To qualify for the exemption under this subsection, a property must be producing crude oil at the maximum feasible rate throughout the 12-month qualifying period and in accordance with recognized conservation practices.

(4) The President may define terms used in this subsection consistent with the purposes thereof.

6 C.F.R. § 150.54(s), 38 Fed. Reg. 32494-95 (Nov. 26, 1973), provided as follows:

(s) *Stripper Wells*—(1) *Rule.* Effective November 16, 1973, the price charged for the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease is exempt.

(2) *Definitions.* As used in this paragraph—

"Average daily production" means the qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar month, divided by a number equal to the number of days in that month times the number of wells which produced crude petroleum and petroleum condensates, including natural gas liquids, from that property in that month. To qualify as maximum total production, each well on the property must have been maintained at the maximum feasible rate of production, in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanial [*sic*] failure or other disruption in production.

"Domestic crude petroleum" means crude petroleum produced in any of the several States, or the District of

Columbia or from the "outer continental shelf" as defined in 43 U.S.C. 1331.

"First sale" means the first transfer for value by the producer or royalty owner.

"Property" is the right which arises from a lease in existence in 1972 or from a fee interest to produce domestic crude petroleum in existence in 1972 and is coextensive with that property used in § 150.354(b) for the purposes of determining "base production control level."

"Stripper well lease" means a "property" whose average daily production of crude petroleum and petroleum condensates, including natural gas liquids, per well did not exceed 10 barrels per day during the preceding calendar month.

6 C.F.R. § 150.54(s), as amended, 38 Fed. Reg. 34464-65 (Dec. 14, 1976), provided as follows:

(s) *Stripper Wells*—(1) *Rule.* Effective November 16, 1973, the price charged for the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease is exempt.

(2) *Definitions.* As used in this paragraph—

"Average daily production" means the qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of days in that year times the number of wells which produced crude petroleum and petroleum condensates, including natural gas liquids, from that property in that year. To qualify as maximum total production, each well on the property must have been maintained at the maximum feasible rate of production, in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production.

"Domestic crude petroleum" means crude petroleum produced in any of the several States, or the District of Columbia or from the "outer continental shelf" as defined in 43 U.S.C. 1331.

"First sale" means the first transfer for value by the producer or royalty owner.

"Property" is the right which arises from a lease in existence in 1972 or from a fee interest to produce domestic crude petroleum in existence in 1972 and is coextensive with that property used in § 150.354(b) for purposes of determining "base production control level."

"Stripper well lease" means a "property" whose average daily production of crude petroleum and petroleum condensates, including natural gas liquids, per well did not exceed 10 barrels per day during the preceding calendar year.

10 C.F.R. § 212.54, 41 Fed. Reg. 48319, 48323 (Nov. 3, 1976), provided as follows:

Prices charged in the first sale of crude oil (excluding condensate recovered in non-associated production), produced and sold from any stripper well property are exempt from the provisions of this part.

(b) Prices charged in the first sale of imputed stripper well crude oil, as defined in § 212.75(f), produced and sold from any unitized property are exempt from the provisions of this part.

(c) Definitions.

"Average daily production" means the qualified maximum total production of crude oil (excluding condensate recovered in non-associated production) produced from a property, divided by a number equal to the number of days in the 12-month qualifying period times the number of wells that produced crude oil (excluding condensate recovered in non-associated production) from that property in that 12-month qualifying period. To qualify as maximum total production, each well on the property must have been maintained at the maximum feasible rate of production throughout the 12-month qualifying period and in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production.

"First sale" means the first transfer for value by the producer or royalty owner. With respect to transfers be-

tween affiliated entities, the "first sale" shall be imputed to occur as if in arms-length transactions.

"Stripper well property" means a "property" whose average daily production of crude oil (excluding condensate recovered in non-associated production) per well did not exceed 10 barrels per day during any preceding consecutive 12-month period beginning after December 31, 1972.

Federal Energy Administration Ruling 1974-29, 39 Fed. Reg. 44414-15 (Dec. 24, 1974), provided as follows:

PRODUCTION WELLS FOR PURPOSES OF THE "STRIPPER WELL LEASE" EXEMPTION

Facts. Firm P, a producer of petroleum, produced during the preceding calendar year 150,000 barrels of crude petroleum and petroleum condensates, including natural gas liquids from 40 production wells located on Property A, as defined in 10 CFR 210.32. In addition, there were five injection wells in operation on that property last year. An injection well is one which is used to inject water, air, gas, steam or other materials into the ground to assist in the recovery of crude petroleum through producing wells. Wells which formerly produced crude petroleum may be used for injection purposes, or new wells may be drilled solely for the purpose of injecting materials into oil-bearing formations and reservoirs.

The average daily production per well from Property A was 10.27 barrels, based on the 40 production wells, whereas the average daily production per well would be 9.13 barrels if 45 wells, including the 5 injection wells, were used to calculate the average daily production figure.

Issue. Is an "injection" well a "well" for the purpose of determining whether the average daily production of a property was 10 barrels or less per well in the preceding calendar year, for purposes of the stripper well lease exemption of 10 CFR 210.32?

Ruling. No. Under the FEA regulations, the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper

well lease, is exempt from the mandatory price and allocation regulations. A stripper well lease is defined as a property whose average daily production did not exceed 10 barrels per day per well during the preceding calendar year. "Average daily production" is further defined in 10 CFR 210.32(b) as:

> The qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of days in that year times the number of wells which produce crude petroleum and petroleum condensates, including natural gas liquids, from that property in that year.

Thus, the FEA regulations by their specific language provide that only wells "which produce crude petroleum" are to be counted in calculating average daily production for the purpose of determining whether the stripper well lease exemption applies. While injection techniques help to "produce" crude petroleum, they are not wells which themselves "produce" crude petroleum. Therefore, wells which did not actually yield or produce crude petroleum during the preceding calendar year are not production wells for this purpose. Whether the non-producing well was an "injection" well, a disposal well, a dry well, a spent well or a shut-in well will not change this result.

APPENDIX J

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APPENDIX K

The following is a complete list of the petitioners in this case:

Energy Reserves Group, Inc.
Suburban Propane Gas Corporation
Marathon Petroleum Company (formerly Marathon Oil Company)
Sklar & Phillips Oil Company
Sierra Petroleum Co., Inc.
Braden-Zenith, Inc.
Estate of S. H. Killingsworth
Mobil Oil Corporation
Mobil Producing Texas & New Mexico, Inc.
Willie Ansley Bryson
Stelbar Oil Corporation, Inc.
The Standard Oil Company, an Ohio Corporation
Theo M. Glenn, Jr.
Eleanor E. Glenn
Robert Dale Brandenburg
Texaco Inc., a Delaware Corporation
Continental Oil Co., Inc. (Conoco)
Sun Exploration and Production (formerly Sun Oil Company (Delaware))
Otis C. Peavey
Everal A. Peavey
Gladys G. Peavey
Ronald J. Peavey
Kenneth Wellbrock
Nora C. Binder
Fred J. Jorgensen
Arlene M. Wolfe
Dora J. Johnson
Robert F. Johnson
Marilyn J. Johnson
Howard Stout, Co-Trustee of the Charles S. Page Trust
Lorena Houlton, Co-Trustee of the Charles S. Page Trust
Mary E. Hall, Co-Trustee of the Charles S. Page Trust

Gulf Oil Corporation
Robert E. Davis
Energy Consumers and Producers Association, Inc. (formerly Oklahoma Association of Energy Consumers and Producers)
Ruthven, Inc.
Pioneer Operations Company, Inc.
George R. Jones
Rex Archer
T. B. Wilcox, III
Wico Oil Company
Jack Fena
James Tasheff
Robert G. Braden
National Cooperative Refinery Association
Estate of Martin Wunderlich
Estate of Charles F. Curry
Guy E. Stanley, Jr.
J. R. Dougherty
John B. Dougherty
Estate of Milton McGreevy
Herndon Drilling Company
Rhude & Fryberger, Inc.
Petroleum Management, Inc.
Atlantic Richfield Company
W. R. Murfin d/b/a Murfin Drilling Company
Champlin Petroleum Company
Union Oil Company of California
The Coastal Corporation (formerly Coastal States Gas Corporation)
Coastal Oil & Gas Corporation (formerly Gas Producing Enterprises, Inc.)
Exxon Corporation
Hunt Oil Company
Crystal Oil Company
Ira Thomas May
Muskegon Development Company
Paul B. Fletcher, Sr.

Anadarko Production Company
IU International Oil & Gas, Inc.
Wood Oil Co.
Dan Wallace d/b/a Columbus Oil Co.
Will I. Lewis Enterprises, Inc.
Jimmie Austin d/b/a Austin Drilling Company
Santa Fe Energy Company
George G. Anderman
Donald R. Kirby
Patricia Anne Leonard
Mary Kay Harrington
A. F. McMillan
Zula McMillan
Farmers Crude Production Co. (formerly Farmers Petroleum Cooperative, Inc.)
William C. Kirkwood d/b/a Kirkwood Oil and Gas Company
Petroleum Corporation of Texas*

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* The above is a complete list of the appellees in the court of appeals, with the exception of Aminoil USA, Inc., and Valero Energy Corporation (formerly Coastal States Gas Producing Company), which have determined not to file a petition for a writ of certiorari. It is the petitioners' belief that these two firms have no interest in the outcome of the petition.

APPENDIX L

Pursuant to Rule 28.1 of the Rules of this Court, petitioners herein provide the following information with respect to parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates.

ENERGY RESERVES GROUP, INC.:

Clinton International Corporation

MARATHON PETROLEUM COMPANY (FORMERLY MARATHON OIL COMPANY):

A & G Transportation Company
Airport Company of Hilton Head Island, Inc., The
Alside, Inc.
Alside Molded Products, Inc.
Altos Hornos de Vizcaya
Aluma-King Corporation
Apollo Gas Company
Arbeitsgemeinschaft Steinkohle
Arctic LNG Transportation Company
Arcturus Mines Ltd.
Associated Manganese Mines of South Africa, Ltd.
Athlone Prospecting & Development Corporation, Ltd.
Atlantic Nickel Mines Limited
Automotive Fuel Corporation
Automotive Fuel Corporation of Delaware, Inc.
Badger Pipe Line Company
Bartow Chemical Products
Belleview Biltmore Country Club Corporation
Belleview Management Company, Inc.
Belleview Plaza West Corporation
Bessemer and Lake Erie Railroad Company
Birmingham Southern Railroad Company
Brazaco Mapri Industrias Metalurgicas S.A.
Carbon County Railway Company
Carnegie Natural Gas Company
Cartier Railway Company

Cavalier Petroleum Company of Cuba
Central Radio Telegraph Company
Century III Associates
Cheker-Imperial Oil Co. of Alabama
Cheker-Imperial Oil Co. of Arkansas
Cheker-Imperial Oil Co. of Georgia
Cheker-Imperial Oil Co. of Iowa
Cheker-Imperial Oil Co. of Kansas
Cheker-Imperial Oil Co. of Mississippi
Cheker-Imperial Oil Co. of Missouri
Cheker-Imperial Oil Co. of Nebraska
Cheker-Imperial Oil Co. of Tennessee
Cheker Oil Company
Cheker Oil Company of Delaware, Inc.
Cheker Oil Company of Florida, Inc.
Cheker Oil Company of Indiana, Inc.
Cheker Oil Company of Michigan, Inc.
Cheker Oil Company of Ohio, Inc.
Cheker Oil Company of Wisconsin, Inc.
City Point Oil Terminal, Incorporated
CLAM Petroleum Company
Coastal Plains Oil Company
Companhia Meridional de Mineracao
Compania Iberica Refinadora de Petroleos, S.A.
Compagnie Miniere de l'Ogooue
Cook Inlet Pipe Line Company
Cygnus Mines, Ltd.
Deutsche Transalpine Olleitung GmbH
Dor Rae Realty, Ltd.
Duluth, Missabe and Iron Range Railway Company
East Texas Salt Water Disposal Company
ECOL Inc. (A Mississippi Corporation)
Elgin, Joliet and Eastern Railway Company
Elk Water Users Association
Essex Minerals Company
Explorer Pipeline Company
Farmers Union Central Exchange, Incorporated
Federal's Inc.
Feralloys Limited

FHS Automotive Parts Manufacturing Ltd.
FHS Stahlverformung GmbH
Guard-All Building Materials Company, Inc.
Globe Oil Company, U.S.A.
Gravcap, Inc.
Green Bay Terminal Corporation
Hart-Jaune Power Company
Hilton Head Management Co., Inc.
Indonesian Enterprises, Inc.
Industria de Tubos y Perfiles, S.A. (Intupersa)
International Petrodata, Inc.
Johnstown and Stony Creek Railroad Company
Kenai LNG Corporation
Kroll Glass Service, Inc.
Lafayette Parking, Inc.
Lake Terminal Railroad Company, The
Lighthouse Realty, Inc.
Live Oak Uranium Operations
LOCAP Inc.
LOOP Inc.
Marco South, Inc.
Marine Transfer, Inc.
McKeesport Connecting Railroad Company
Mecania Walsywa LTDA.
Met-Chem Canada, Inc.
Mid-Wood, Inc.
Minerals Ordaz C.A.
Mon-Valley Transportation Company
Mustang Petroleum Company
Navios Corporation
Navios Shipholding Inc.
Navios Ship Management Services, Inc.
Newburgh and South Shore Railway Company, The
Northern Tier Pipeline Company
Northampton & Bath Railroad Company
Oasis Oil Company of Libya, Inc.
Ohio Barge Line, Inc.
Oil Insurance Limited
Oil Shippers Service, Inc.

Oklahoma Oil Co.
Oresteel Investments (Proprietary) Limited
Orinoco Mining Company
Pasadena Yacht and Country Club Corporation
Pennzoil do Brazil, Ltd.
Petroleum Terminals, Incorporated
Pewabic Company
Pilot Oil Corporation
Pittsburgh & Conneaut Dock Company, The
Platte Pipe Line Company
Polor LNG Shipping Corporation
Port Oil Inc.
P. T. Pacific Nikkel Indonesia
Prieska Copper Mines (Proprietary) Limited
Qualbank, Inc.
Quebec Cartier Mining Company
Rama Sapyakorn Patana Ltd.
Rinker Materials Corporation
River & Gulf Transportation Company
Rockland Joint Venture
Russell Stewart Oil Co.
Sandcastle Land Company, Inc.
Seven Springs Country Club, Inc.
Shell/USS Joint Venture
Sidbec-Normines Incorporated
Sidon Canal Co.
Societa Italiana Per L'Oleodotto Transalpino, S.p.A.
Swedcast Canada Limited
TEN/USS Joint Venture
Terninoss Acciai Inossidabili, S.p.A.
TEX/USS Joint Venture
Tideland Realty of Hilton Head, Inc.
Tideland Realty of Ohio, Inc.
Tideland Timesharing, Inc.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich G.m.b.H.
Triangeler Daemmstoffwerk GmbH
Union Railroad Company
United States Steel Corporation

U.S. Steel Credit Corporation
U.S. Steel International of Canada, Ltd.
United States Steel International, Inc.
United States Steel International (Overseas) Limited
United States Steel International Sales Company
U.S. Steel Mining Co., Inc.
U.S. Steel Overseas Capital Corporation
U.S. Steel Pipeline Co., Inc.
U-Save, Inc.
USS, Inc.
USS Engineers and Consultants, Inc.
USS Holdings Company
USS Great Lakes Fleet, Inc.
USS Great Lakes Fleet Services, Inc.
USS Lake Transport, Inc.
USS Novamont, Inc.
USS Oilwell Supply Co. Ltd.
USS Oilwell Supply Co. International, Inc.
USS Portfolio, Inc.
USS Seaway Transport, Inc.
USSAC, Inc.
Valley Beach, Inc.
Warrior & Gulf Navigation Company
Webster Service Stations, Inc.
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyoming Industrial Development Corporation
Youngstown and Northern Railroad Company, The
Zuari Agro Chemicals Limited

SIERRA PETROLEUM CO., INC.:

National Bank West Financial Corp.
Twin Lakes Financial Corp.
United American Bank & Trust Company

MOBIL OIL CORPORATION:

(Interests of 5% or greater)

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited

Adria-Wien Pipeline Gesellschaft m.b.H.
AIMCO (ALPHA) Shipping Company
AIMCO (OMEGA) Shipping Company Ltd.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH
AK Chemie GmbH & Co KG
Akauma Rekisei Kogyo Kabushiki Kaisha
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian International Maritime Company Limited
Arabian International Maritime Company
The Arabian Petroleum Supply Company (S.A.)
Arabian Shipping & Trading Company S.A.
Arabian Trading Company S.A.
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
Ammenn GmbH
The Associated Octel Company Limited
Associated Octel Company (Plant) Limited
ATAS-Anadolu Tasfiyehanesi Anonim Sirketi
Atlas Sahara S.A.
Australasian Petroleum Company Proprietary Limited
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anonim Sirketi
B.V. Beheersmaatschappij MOBEM
Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH

Bin Sulaiman Mobil Towers
Bayerische Mineral Industrie A.G.
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trelleborg
Bostadsrattsforeningen Skepparegarden, Norrkoping
Brazos Heights Housing Incorporated
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Cartoenvases Valencia, S.A.
Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
Celmisia Shipping Corporation
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercera S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Nenryo Gas Kabushiki Kaisha
Colombianos Distribuidores de Combustibles, S.A. (CODI)
Colonial Pipeline Company
Combustibles Colmerauer
Comet-Brennstoffdienst GmbH
Commodore Maritime Company, S.A.
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Compagnie Immobiliere (Comimmo)
Compagnie Regionale de Distribution de Produits Petroliers-C.O.R.E. Dis.
Compagnie Rhenane de Raffinage
Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Compania Mexicana de Especialidades Industriales, S.A. de C.V.

Consortium Raymond Duez
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company
CORCOP
Corrugadora de Carton, S.A.
C.R.C. Lyon Chauffage
CRCP
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Dai Nippon Jushi K.K.
De. Ba. Deposito di Bari S.p.A.
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depot de Petrole Cotiers
Depots Petroliers de La Corse (DPLC)
Deutsche Mobil Oil Exploration Ireland Ltd.
Deutsche Pentosin-Werke GmbH
Deutsche Transalpine Oelleitung GmbH
Dicomi S.r.l.
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
Emoleum (Asphalts) Limited
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre
Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Lagergesellschaft mbH
Erdoel-Raffinerie Neustadt GmbH & Co. oHG
Erdoelbetrieb Reitbrook
Erdoelraffinerie Gesellschaft mbH in Liquidation
Establissments Bouthenet
Establissements Nicol and Cie

Ets. R. Saillard
Establissements Wagner
Faavang Autoverksted A/S
FACEL
Fairwind Maritime Company, S.A.
Felix Oil Company
Filtroleo-Sociedade Portuguesa de Filtros Lda.
Filtros De Costa Rica S.A.
Finsbury Printing Limited
Fountain Garage (East Park) Ltd.
Fountain Garage (Meadowhead) Ltd.
Fountain Garage (Mercury) Ltd.
Fountain Garage (Newbury Park) Ltd.
Fountain Garage (Stirchley) Ltd.
Frome-Broken Hill Company Proprietary Limited
Fruehmesser mineraloelhandels GmbH & Co. KG
Fruehmesser GmbH
Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gaz Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Ghana Bunkering Services Limited
Goteborgs Branslesortering AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
Handelmaatschappij Hugenholtz & Co. B.V.
Heizoel-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Highgate Associates, Ltd.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Imperial Gas Co. of P.R., Inc.
Industria de Carbon del Valle Cauca, S.A.
Iranian Oil Participants Limited

Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Iraq Petroleum Transport Company Limited
Island Exploration Company Proprietary Limited
Istanbul Petrol ve Makine Yasglari Limited Sirketi
Japan Airport Fueling Service Co. Limited
Japan Solar Energy Co., Ltd.
J.E.C.O.P.
K.K. Sankyo Plastics
K.K. Toresen
Kanto Kyguns Sekiyu Hambai K.K.
Kanto Oil Pipeline Co., Ltd.
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihin Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineraloel KG
Kobe Port Service Kabushiki Kaisha
Kurt Ammenn GmbH & Co. K.G.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu Kabushiki Kaisha
Kyokyto Petroleum Services Overseas, Ltd.
Kyokuto Sekiyu Kogyo Kabushiki Kaisha
Les Nouveaux Comptoirs Petroliers
Les Supermarches De Cote D'Ivoire
Likit Petrol Gazi ve Yakit Ticaret A.S.
Lubricantes del Sur, S.A.
Marceaux & Cie
Matco Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Mobil Ami, S.A.
Mobil Atlas Sociedad Anonima de Capital Variable

Mobil Chemie Belgie N.V. and Mobil Chimie Belge S.A.
Mobil Comercio, Industria e Servicos Ltda.
Mobil Gaz-Mobil Petrol Gazlari Anonim Sirketi
Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG
Mobil Nile Oil Company
Mobil Oil Angola, SARL
Mobil Oil Cameroun
Mobil Oil Cote d'Ivoire
Mobil Oil Dahomey
Mobil Oil Djibouti, S.A.
Mobil Oil Francaise
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Haute Volta
Mobil Oil Holdings, S.A.
Mobil Oil Mali
Mobil Oil Maroc
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Philippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Rwanda-Burundi (S.A.R.L.)
Mobil Oil Senegal
Mobil Oil Tchad
Mobil Oil Togo
Mobilrex
Mobil Tunisie
Mobil Tyco Solar Energy Corporation
Molinos de Carton y Papel, S.A.
Morem
Mosul Petroleum Company Limited
Motel Rest SA
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation

New Zealand Refining Company Limited, The
New Zealand Synthetic Fuels Corp. Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.
Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates
Octel S.A.
Oil Kol (Proprietary) Limited
Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P.T. Arun Natural Gas Liquefaction Company
P.T. Stanvac Indonesia
Paloma Pipe Line Company
Pars Investment Corporation
Pembalta Gas System No. 1 Ltd.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pembalta Gas System No. 5 Ltd.
Pembalta Gas System No. 6 Ltd.
Perretti Petroli S.p.A.
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Petromin-Mobil Yanbu Refinery Company Ltd.
Pipe-Lines de al Pallice

Plegadizos para la Industria S.A.
Poly Oil Chimie (P.O.C.)
Qatar Petroleum Company Limited
Qualbank, Inc.
Rainbow Pipe Line Company, Ltd.
Randhurst Corporation
Reforestadora Andina, S.A.
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Rohel-Aufsuchungs Gesellschaft mbH
Ruhrgas Aktiengesellschaft
S&M Pipeline Limited
S.A. Mas & Cie
S.A.M. Lebreton
Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company
Sanwa Kasei Kogyo Kabushiki Kaisha
SARL Garage Pineau
Sarni S.p.A.
Saudi Arabian Maritime Company
Saudi Can Company, Ltd., The
Saudi Chemical Industries Company Limited
Saudi Maritime Company Ltd.
Saudi Tankers Limited
Saudi, Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
S.C.I. Du Fonds Du Val
Segher de Mexico, S.A. de C.V.
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
SENERCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
R. Simonnet & CIE
Sociedade Portugal Marrocos SARL
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Agicole Des Entreprises Petrolieres (S.A.D.E.P.)

Societe Anonyme Establissments Nicol and Cie
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Civile de Mustapha
Societe Civile Immobiliere Courcelles-Etoile
Societe Civile Immobiliere de Construction de 34 Avenue du General Leclerc a Boissy-St-Leger
Societe Civile Immobiliere de Construction "La Residence Brune"
Societe Civile Immobiliere du 10 Bd. de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Civile Immobiliere Mobil
Societe Dahomeenne d'Entreposage de Produits Petroliers
Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gaz D'Oceanic (SOGADOC)
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dakar-Yoff
Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe de Maperialx d'Etancheite Pour Le Entreprises (Meple)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage d'Hydrocarbures de Bingo (SEHBI)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe de Renovation D'Emballages Metalliques (REM)
Societe d'Habitations a Loyer Modere de la Seine Maritime
Societe des Bitumes et Cut-Backs du Cameroun
Societe des Establissements Goux
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-European
Societe Francaise Stoner-Mudge

Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.
Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de Produits Petroliers
Societe Nationale de Raffinage (Sonara)
Societe Nouvelle Raffinerie Meridionale De Ceresines (RMC)
Societe Novodis
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)
Societe Regionale De Produits Petroliers
Societe Regionale de Produits Energetiques
Societe Tahitienne de Depots Petroliers
Societe Tchadienne D'Entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
SOMODIP
Sonarep (South Africa) (Proprietary) Limited
SONEX
South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
Station-Service Lunes
Sydney Metropolitan Pipeline Pty. Ltd.
Syria Petroleum Company Limited
T.R. Miller Mill Company, Inc.
Tanklagergesellschaft Koln-Bonn
Tecklenburg GmbH
Tecklenburg GmbH & Co. Energiebedarf K.G.
Texoma Pipe Line Company
Thailand Lubricant Products Limited
Thailand Solvent Products, Ltd.
Thums Long Beach Company
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.
Tonen Energy International Corp.
Tonen Sekiyu Kagaku Kabushiki Kaisha

Tonen Tanker Kabushiki Kaisha
Tonen Technology Kabushiki Kaisha
Total Centrafricaine de Gestion (TOCAGES)
Toulouse-Distribution Produits Petroliers
Toyoshina Film Co., Ltd.
Tradewind Maritime Co., S.A.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gessellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgas Umschlags-Lager-Und Transport Gesellschaft MbH
Turkish Petroleum Company Limited
Twifo Oil Plantations Ltd.
UBAG Unterflur Betankungsanlage Flughafen Zurich
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Wakohjushi Kabushiki Kaisha
Werner Weidemann Mineraloelvertrieb G.m.b.H.
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyco Pipe Line Company
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieres

MOBIL PRODUCING TEXAS & NEW MEXICO, INC.:

No interests of 5% or greater.

THE STANDARD OIL COMPANY (AN OHIO CORPORATION):

Abrasivos, C.A.
Algers, Winslow & Western Railway Co.
Alyeska Equipment Company
Alyeska Pipeline Service Company
Apache Powder Company
Arbomex S.A.
Arendal Sike G.m.b.H.

Arendal Smelteverk a.s.
Atlas Supply Company
BP Alaska Inc.
BP International Limited
Brazniv Fiaco e Tecelagem LTDA
Carbo Tzujan Industrial Co., Ltd.
Carborundum, C.A.
Carborundum Industrias Abrasivas, S.A.
Carborundum Piratininga Equipamentos Industriais Ltda.
Carborundum S.A. (Industria Brasileira de Abrasivos)
Carborundum S.A. Industrial y Commercial
Carborundum - Universal (Cape) (Pty.) Ltd.
Carborundum - Universal Estates S.A. (Pty.) Ltd.
Carborundum - Universal Ltd.
Carborundum - Universal Natal (Pty.) Ltd.
Carborundum - Universal S.A.(Pty.) Ltd.
Carborundum - Universal Springs (Pty.) Ltd.
Carborundum - Universal Transvaal (Pty.) Ltd.
Carborundum - Universal (Vereeniging) (Pty.) Ltd.
Carboscan A/S
Colonial Pipeline Company
Compania Nacional de Abrasivos, S.A.
Delaware Bay Transportation Company
Distribuidora Carborundum C.A.
Electrometalurgica de Barbacoas, C.A.
Electrometalurgica de Veracruz, S.A. de C.V.
Electro Metalurgica Abrasivos Salto Ltda.
E. T. Irrigating Canal Company
Equipos y Procesos S.A.
Esmeriles Nacionales C.A.
Fabrica Nacional de Lija, S.A. de C.V.
Ferix Corporation
Frabianca (Proprietary) Limited
G.L.C. Canada Inc.
Granalha de Aco, S.A.
Gravcap, Inc.
Hindustan Dorr-Oliver Limited
Inland Corporation

Inmobiliara Carper, S.A.
Iricon Agency, Limited
Iranian Oil Participants Limited
Japan Purification Co., Ltd.
Kennwest B.V.
Laurel Pipeline Company
Miami Valley Corporation
Mid-Valley Pipeline Company
Minera Cerro San Petro, S.A. de C.V.
Minera Santa Veronica, S.A. de C.V.
Minerales de Bolanos, S.A.
National Filter Media Corporation, The
Nippon Coated Abrasive Co., Ltd.
North Jordan Irrigation Company
Oil Insurance Limited
Parabo Development Corporation
Patel Filters Limited
Productora de Abrasivos, S.A.
Quebec Columbium Limited
Republic Abrasives (Pty.) Ltd.
Ress Realty Company
Richards Bay Iron and Titanium (Pty.) Limited
Societe Miniere d'Haiti, S.A.
Societe Ponces Abrasifs et Meules
Sohio/BP Trans Alaska Pipeline Capital Inc.
Stiffelio Investments (Proprietary) Limited
Stikine Copper Limited
Stoline Limited
Ta Kwang Refractories Co., Ltd.
Tin and Associated Minerals Limited
Tirbit v.o.f.
Tisand (Proprietary) Limited
Tokyo Kokyu Rozai K.K.
Tokyo Kokyu Rozai Co., Ltd.
Toshiba Monofrax K.K.
Toshiba Monofrax Co., Ltd.
Universal Filter Media Ltd.
West Texas Gulf Pipe Line Company
White River Shale Oil Corporation

TEXACO INC.
(A DELAWARE CORPORATION):

American Overseas Petroleum Limited (Bahama Islands)
Arabian American Oil Company (Del.)
Badger Pipe Line Company (Del.)
Caltex Deutschland GmbH (Germany)
Caltex Mediterranean Limited (Del.)
Caltex Petroleum Corporation (Del.)
Colonial Pipeline Company (Del.)
Coltexo Corporation (Md.)
Deutsche Texaco Aktiengesellschaft (Germany)
Dixie Pipeline Company (Del.)
Explorer Pipeline Company (Del.)
Ful-Tex Euro Services Inc. (Del.)
Kaw Pipe Line Company (Del.)
Laurel Pipe Line Company (Ohio)
LOCAP Inc. (Del.)
Loop Inc. (Del.)
Neches Butane Products Company (Del.)
Olympic Pipe Line Company (Del.)
Pipelines of Puerto Rico Inc., The (Puerto Rico)
P.T. Caltex Pacific Indonesia (Indonesia)
Refineria Texaco De Honduras, S.A. (Honduras)
Skandinaviska Raffinaderi Aktiebolaget Scanraff (Sweden)
Sociedade Anonima de Oleo Galena-Signal (Brazil)
Societa Per Azioni Raffineria Padana Olii Minerali Sarpom
Texaco Angola-Prospeccao e Producao (TEXPRO), S.A.R.L.
Texaco Butadine Company (Del.)
Texaco Canada Inc. (Canada)
Texaco-Cities Service Pipe Line Company (Del.)
Texaco Gabon (Republic of Gabon)
Texaco Ghana Limited (Republic of Ghana)
Texaco Inc. (Del.)
Texaco Maroc (Morocco)
Texaco Mexicana, S.A. de C.V.

Texaco Nigeria Limited (Nigeria)
Texaco Overseas (Nigeria) Petroleum Company (Nigeria)
Texaco Togo (Togo)
Texaco Yugoslavia Inc. (Del.)
Texas-New Mexico Pipeline Company (Del.)
West Shore Pipe Line Company (Del.)
Wolverine Pipe Line Company (Del.)
Wyco Pipe Line Company (Del.)
Zaire-Texaco S.A.R.L. (Zaire)

CONTINENTAL OIL CO., INC. (CONOCO):

Adela Investment Company S.A.
Airport Limited Partnership
Allied Eneabba Ltd.
A/S Soties Plass 2
Associated Petroleum Terminals Ltd.
Augusta Natural Gas Limited
Benzene Marketing Co. Ltd.
Big Sky of Montana Realty, Inc.
Bishop Coal Company
Bontec Company, Ltd.
Brandywine Assurance Company Ltd.
Calcasieu Chemical Corporation
Carbon Black Espanola, S.A.
Cardinal Riner Coals, Ltd.
Caribe Biochemicals, Inc.
Cedarcrest Company Limited
Christiana Securities Company (inactive)
Cit-Con Oil Corporation
Cliffe Storage Ltd.
Colonial Pipeline
Colorquim, S.A. de C.V.
Comercial Quimica Peru S.A.
Compagnie Francaise du Carbon Black, S.A.
Conch International Methane, Ltd.
Conch L.N.G.
Concord Limited Partnership

Condea Chemie, GmbH
Conoco Exploration, Ltd.
Conoco-Du Pont Exploration
Conoco-Du Pont Exploration II
Conrhein Coal Co.
Continental Columbian Carbon Nederland, B.V.
Contochu, Inc.
Crude Oil Terminals (Humber) Ltd.
Del Lago Development Corporation
Derivados Macroquimicos, S.A.
Derivados Sinteticos, S.A. de C.V.
Desarrollo Quimico Industrial, S.A.
Dixie Pipeline
Ducanex Resources Limited
Ducilo S.A.
D.U.K. Shipping Limited
Du Pont Asia Pacific Limited
Du Pont (Australia) Ltd.
Du Pont Canada Inc.
Du Pont Chemicals & Textiles (B.C.) Limited
Du Pont Chemicals & Textiles (Eastern) Limited
Du Pont de Colombia, S.A.
Du Pont de Nemours Argentina S.A.
Du Pont de Nemours (Belgium)
Du Pont de Nemours (Deutschland) GmbH
Du Pont de Nemours Development S.a.r.l.
Du Pont de Nemours (France) S.A.
Du Pont de Nemours International S.A.
Du Pont de Nemours Italiana S.p.A.
Du Pont de Nemours (Luxembourg) S.A.
Du Pont de Nemours (Nederland) B.V.
Du Pont de Nemours Nordiska A.B.
Du Pont de Venezuela C.A.
Du Pont do Brasil S.A.
Du Pont du Quebec Limitee
Du Pont Far East Inc.
Du Pont Feedstocks Company
Du Pont Fibres S.A.

Du Pont (Hong Kong) Limited
Du Pont Iberica, S.A.
Du Pont Inter-America Chemical Company, Inc. (inactive)
Du Pont International Sales Corporation
Du Pont Iran Company (inactive)
Du Pont (Ireland) Limited
Du Pont (Japan) K.K.
Du Pont (New Zealand) Limited
Du Pont of Canada Exploration Limited
Du Pont Overseas Capital N.V.
Du Pont Photolux S.A.
Du Pont, S.A. de C.V.
Du Pont (Singapore) Electronics Private Limited
Du Pont Sistemas de Interconexiones Mexicanos, S.A. de C.V.
Du Pont Taiwan Chemicals Ltd.
Du Pont Taiwan Ltd.
Du Pont (Thailand) Co. Ltd.
Du Pont (U.K.) Limited
Ebina Sangyo K.K. (Japan)
EDOBI
Endo Canada, Inc.
Endo Drug International Sales Corporation
Endo Inc.
Endo Laboratories (Australia) Proprietary Limited
Endo Laboratories, Inc.
Endo Laboratories (Philippines) Inc.
Endo Pan American Corporation
Endo Pharmaceuticals, Inc.
Explorer Pipeline Company
Felix Oil Company
Geneinneutzige Wohnungsbau GmbH
Geomine, S.A.
Groupement D'Interet Economique Du Pont de Nemours (France) S.S. et Rhone-Poulenc Industries
Harmar Coal Company
Helocarburos, S.A. de C.V.
Hiroshima Sekisui
Hi-Sheet Industries, Ltd.

Humber Oil Terminals Trustee Ltd.
Industries Tecnos, S.A.
Inmobiliaria Altamira, S.A. de C.V.
Inser, S.A.
Inversiones y Terrenos del Golfo, S.A.
Iranian Investment Corp.
Iranian Oil Participants Ltd.
Iranian Oil Services (Holdings) Ltd.
Iricon Agency, Ltd.
Itmann Coal Company
K/s Stratfjord Transport A.S. & Co.
Kettleman North Dome Association
Kyokuto Kobunshi Company, Ltd.
Kyushu Taiyo Kasei Company, Ltd.
KZM Company, Ltd.
Laboratorios Endo de Mexico, S.A.
Lacas y Pinturas, S.A.
La Domincia, S.A. de C.V.
Lake Charles Pipe Line
Long Beach Oil Development Company
Lucky Continental Carbon Co., Ltd.
Maritime Protection (PTE) Ltd.
Maritime Protection A/S
Maritime Protection Inc.
Mathies Coal Company
Minera Rosals, S.A. de C.V. (inactive)
Mitsui Fluorochemicals Company, Ltd.
Mitsui Polychemicals Company, Ltd.
Muromachi Company, Ltd.
NEN Canada, Ltd.
NEN Chemicals, GmbH
NEN France SARL
NEN GmbH
NEN International, Inc.
NEN Technology Development Corp.
Neptune Bulk Terminals (Canada) Limited
New England Nuclear Corporation
Nippon Aluminum Alkyls, Ltd.

Nissan Conoco Corporation (CONSAN)
Nylon de Mexico, S.A.
Oasis Oil Co. of Libya, Inc.
Oil Shippers Service, Inc.
OMW (Oberrheinische Mineraloelwerke GmbH)
Pasa Petroquimica Argentina, S.A.
PD Magnetics B.V.
Peters Cartridge Company, The (inactive)
Petrocokes, Ltd.
Petroleum Storage Ltd.
Petroleum Terminals, Inc.
Petroquimica Espanola, S.A. (PETRESA)
Petrosar Limited
Pigmentos y Productos Quimicos, S.A. de C.V.
Pioneer Pipe Line Company
Platte Pipe Line
Quimica Du Pont Centro America, S.A.
Quimica Fluor, S.A. de C.V.
Remington Arms Company, Inc.
Remington Arms GmbH
Remington Arms of Canada Limited
Remington Export Corporation
Seadock, Inc.
Seaway Pipeline, Inc.
Selang Ltd.
Selgema Industrias Quimicas S.A.
Showa Neoprene K.K.
Societe En Nom Collectif Du Pont de Nemours (France) S.A. et Rhone-Poulenc Industries
Southern Facilities, Inc.
Southern Mississippi Transportation Company (inactive)
Standard Shale Products Company, The
Stratfjord Transport A.S.
Stavangereske Westamarine A/S
Sulitjelma Elektronikk A/S
Syngas Company
Taiyo Kasei Company, Ltd.

T.A.L.
T.A.L. (Austria)
T.A.L. (Italy)
T.A.L. (Luxembourg)
Tetraetilo de Mexico, S.A.
Texas Offshore Port, Inc.
Tidelands Royalty Trust
Tongue River Holdings, Inc.
Tongue River Railroad
Toyo Continental Carbon, Ltd.
Toyo Products Company, Ltd.
Twin Peak Resources
Union Metallic Cartridge Company, The (inactive)
Union National Bank Building
Univex, S.A.
Warwickshire Oil Storage Ltd.
West Shore Pipe Line
Westamarin A/S
Yellowstone Pipe Line

SUN EXPLORATION AND PRODUCTION COMPANY (FORMERLY SUN OIL COMPANY (DELAWARE))

Alaska Bulk Carriers, Inc.
Albersun Pipeline Ltd.
Alberta Gas Truck Line Company Ltd.
Alliance Enterprise Corporation
American Electric Company
Anchor Red Ash Coal Corporation (inactive)
Applied Financial Systems, Inc.
Ardprop, Inc.
Ardvest, Inc.
Arroyo Specialty Products Company (being dissolved)
Athabasca Realty Company Limited
Atlantic Sun Shipping Company, Inc.
Atlas Screw & Specialty Co., Inc.
Balboa Sun Shipping Company, Inc.
Baron Petroleums Inc.

Becton, Dickinson and Company
Beneco Leasing One, Inc.
Beneco Leasing Two, Inc.
Beneco Leasing Three, Inc.
Beneco Leasing Four, Inc.
Beneco Leasing Five, Inv.
Beneco Leasing Six, Inc.
Bighorn Ranch, Inc.
Big Top Market, Inc.
Brentwood Chemical Company, The
British Sun Oil Company, Limited
Buckeye Marketers, Inc.
B.V. De Lange's Oliehandel, Hoogeveen
Canyon Reef Carriers, Inc.
Carboline Company
Carboline Bubai Corporation
Carboline Eastern Europe Corporation
Carboline Export Corporation
Carboline Far East Corporation
Carboline-Ferro Powder Coatings Company
Carboline International Corporation
Carboline World-Wide Corp.
Carnduff Gas Limited
Carolina Consolidators, Inc.
Carrier Systems, Inc.
Carrier Systems International Motor Freight, Inc.-DE
Casual Food Stores, Inc.
Catallactics Corporation
Chemsun Ltd.
Claymont Investment Company, The
Clover Coal Company, Inc. (inactive)
Cordero Mining Co.
CSI Two, Inc.
CSI Seven, Inc.
CSI Eight, Inc.
CSI Nine, Inc.
CSI Ten, Inc.
Cumberland Collieries, Inc.

Deepsea Ventures, Inc.
Delaware Sun Shipping, Inc.
Delaware Valley Marine Agency and Repair, Inc.
Deluxol Oil Company B.V. (Rotterdam)
Diversified Retailers, Inc.
Dominion Coal Corporation
Dorman Products, Inc.
Eastern Sun Shipping, Inc.
East Texas Salt Water Disposal Company
Elk River Coal Terminals, Inc.
Elk River Resources, Inc.
Enexco, Inc. (inactive)
Environmental Services of New Jersey, Inc.
Environmental Waste, Inc.
Explorer Pipeline Company
Fast Fare, Inc.
Fast Fare Markets of N.C., Inc.
Fast Fare Markets of S.C., Inc.
Federal Pipe and Steel Corporation
Financial Independents, Inc.
Florida Barge Company
Fourleaf Coal Company, Inc. (inactive)
Freedom Coal Company, Inc. (inactive)
General Industrial Supply Corp.
Glacier Bay Transportation Company
Gow Fuels Inc.
Greenleaf Equipment Company
Greenwood Land & Mining Company
Harding Glass Industries, Inc.
Heleasco One, Inc.
Heleasco Two, Inc.
Heleasco Three, Inc.
Heleasco Four, Inc.
Heleasco Five, Inc.
Heleasco Six, Inc.
Heleasco Seven, Inc.
Heleasco Eight, Inc.
Heleasco Nine, Inc.

Heleasco Ten, Inc.
Heleasco Eleven, Inc.
Heleasco Twelve, Inc.
Heleasco Thirteen, Inc.
Heleasco Fourteen, Inc.
Heleasco Fifteen, Inc.
Heleasco Sixteen, Inc.
Heleasco Seventeen, Inc.
Heleasco Eighteen, Inc.
Heleasco Nineteen, Inc.
Heleasco Twenty, Inc.
Heleasco Twenty-One, Inc.
Heleasco Twenty-Two, Inc.
Heleasco Twenty-Three, Inc.
Heleasco Twenty-Four, Inc.
Heleasco Twenty-Five, Inc.
Heleasco Twenty-Six, Inc.
Heleasco Twenty-Seven, Inc.
Heleasco Twenty-Eight, Inc.
Heleasco Twenty-Nine, Inc.
Heleasco Thirty, Inc.
Heleasco Thirty-One, Inc.
Heleasco Thirty-Two, Inc.
Heleasco Thirty-Three, Inc.
Heleasco Thirty-Four, Inc.
Heleasco Thirty-Five, Inc.
Heleasco Thirty-Six, Inc.
Heleasco Thirty-Seven, Inc.
Helios Assurance Company
Helios Capital Corporation
Helios Investment Corporation
Helios Service Company
Hemisphere Oil Company, Inc. (Del)
Hemisphere Oil Company, Inc. (PR)
Herr Gas & Oil Co.
H.H. Palmer, Inc.
Hillman Fastener Corporation
Hoosier Stop-N-Go, Inc.

Hotchkiss Oil Company, Incorporated
Independent Bank Computer Corporation
Inland Corporation
International Biomedical Instruments, Inc.
Japan Sun Oil Company, Ltd.
Jewell Coal and Coke Company, Inc.
Jewell Resources Corporation
Jewell Smokeless Coal Corporation
Jewell Supply Company
J.M.J. Enterprises, Inc.
J. N. Fauver Co., Inc.
J. N. Fauver (Canada) Limited
Jones Truck Lines, Inc.
Kar Products, Inc.
Kee Leasing Company
Kelly Company
Kenco Petroleum Marketers Incorporated
Kwik-Pik Realty, Inc.
Langford Farms Country Club, Inc.
Lansing-Lewis Company (being dissolved)
Lansing Oil Company (being dissolved)
Lou Petroleum Company
Lou Towing Company
Lucky Star Coal Company, Inc.
Lugrasa, S.A.
Marine Investment Company of Delaware
Mascot Petroleum Company, Inc.
Maywelle Properties Ltd.
Metromoney Services, Inc.
Mid-Continent Pipe Line Company
Middle East Sun Oil Company
Mid-State Oil Company
Mid-Valley Pipeline Company
Millcreek Leasing Corporation
Milne Truck Lines, Inc.
Minnisink Oil Company, Inc. (being dissolved)
Mr. Zip, Inc.
Modern Oil Company (merging into Mid-State)

Mohawk Valley Oil, Inc.
Montour Auto Service Company
Morgan's Run Corporation
Muskoka Oil Company Limited
National Railway Utilization Corporation
New Jersey Sun Shipping, Inc.
New York Sun Shipping Co., Inc.
Northern Sun Shipping Co., Inc.
NMF, Inc.
Nottingham Gas Limited
Oakwood Red Ash Coal Corporation (inactive)
Ocean Mining Associates
Oil Insurance Limited
Olney Oaks Land Development Corporation
104274 Canada Inc.
Oneida Coal Company, Inc.
Osborn Supply, Inc.
Ouimet-Gobeille Inc.
Parachem, Inc.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pennsylvania Sun Shipping, Inc.
Pentagon Industries
Petrochem SDN. BHD.
Petrosun Limited
Philadelphia Sun Shipping Co., Inc.
Philips & Company, Colombia, Missouri
Plymouth Coal Company, Inc.
Prestige Lubricants
Puerto Rico Sun Oil Company
Puerto Rico Sun Realty Company, Inc.
Radep Pipeline Company
Radnor/Aire Corporation
Radnor/Anderson Corporation
Radnor/Aston Corporation
Radnor/Barclay Corporation
Radnor/Birmingham Corporation
Radnor/Bloomfield Hills Corporation

Radnor/Bloomfield-Woodward Corporation
Radnor/Brown Street Corporation
Radnor/Brownsboro Corporation
Radnor/Castleton Corporation
Radnor/Centre Corporation
Radnor/Cherry Tree Corporation
Radnor/Clearwater Corporation
Radnor Corporation
Radnor/Corpus, Inc.
Radnor/Dearborn Heights Corporation
Radnor Development Corporation
Radnor/Dixie Corporation
Radnor/Dulles Corporation
Radnor/East Peoria Corporation
Radnor/Eastown Corporation
Radnor/Englewood Corporation
Radnor/Fairland Corporation
Radnor/Grand Rapids Corporation
Radnor/Greenhouse Corporation
Radnor/Hampton Corporation
Radnor/Hidden Lagoon Corporation
Radnor Homes, Inc.
Radnor/Hunters Pointe Corporation
Radnor/Hurstbourne Corporation
Radnor/I-95 Industrial Park Corporation
Radnor/Investment Corporation
Radnor/Island Corporation
Radnor/Jacksonville Corporation
Radnor/Juno Corporation
Radnor/Jupiter Beach Corporation
Radnor/Jupiter Corporation
Radnor/Jupiter Inlet Corporation
Radnor/Kansas City Corporation
Radnor/Laguna Hills Corporation
Radnor/Matsonford Corporation
Radnor/Michigan Corporation
Radnor/Mishawaka Corporation
Radnor/Nashville Corporation

Radnor/National Square Corporation
Radnor/Newtown Corporation
Radnor/Northwood Corporation
Radnor/Oakland Corporation
Radnor/Oceana Corporation
Radnor/Oceana South Corporation
Radnor of Hutchinson Island Corporation
Radnor/Orange Corporation
Radnor/Paragon Corporation
Radnor/Pennell Corporation
Radnor/Perimeter Park Corporation
Radnor/Plymouth Corporation
Radnor/Portsmouth Corporation
Radnor/Ridge Corporation
Radnor/Route 100 Corporation
Radnor/Sandalwood Corporation
Radnor/Service Corporation
Radnor/Siesta Key Corporation
Radnor/St. Lucie Corporation
Radnor/Sugarland Corporation
Radnor/Uwchlan Corporation
Radnor/Valley Wood Corporation
Radnor/Viewpointe Corporation
Radnor/Westgate Corporation
Radnor/West Palm Beach Corporation
Radnor/West Palm Beach No. 2 Corporation
Raub Supply Company
Redwater Water Disposal Company Limited
Riverway, Inc.
Roto-Swing, Inc.
St. Johnsbury Trucking Company, Inc.
St. Johnsbury Trucking Company of Virginia, Inc.
Sarnia Shipping Company, Inc.
Scheduled Truckways, Inc.
Scott Equipment Company
Shamrock Coal Company, Incorporated
Shamrock Resources Corporation
Sioux Foods, Inc.

650 Leasing Company
652 Leasing Company
653 Leasing Company
660 Leasing Company
663 Leasing Company
666 Leasing Company
667 Leasing Company
670 Leasing Company
673 Leasing Company
675 Leasing Company
Smith Oil Corporation
SMS Petroleums Ltd.
Solartech Limited
Solcar Properties, Inc.
Special-T-Metals Co., Inc.
Standard Trucking Company
STI Investments, Inc.
Stop-N-Go Foods, Inc.
Stop-N-Go Foods of Dayton, Inc.
Stop-N-Go, Inc.
Stop-N-Go of Ohio, Inc.
Stop-N-Go of Southern Minnesota, Inc.
Striker, Inc.
Sultran Ltd.
Sun Barge Company
Sun-Canadian Pipe Line Company Limited
Sun Carriers, Inc.
Sunchem Inc.
Sunchem Shipping Inc.
Sun Company, Inc.
Suncor Inc.
Suncor Supply Limited
Suncrest Industries, Inc. (being dissolved)
Sun-Del Services, Inc.
Sun Disc, Inc.
Sun Distributor, Inc.
Sunedco Coal Company
Sun Exchange, Inc.

Sun Explorations of Quebec Ltd.
Sun Hydroponics Limited (Bermuda Gardens, Ltd.)
Sun Industrial Development Company
Sun Information Services Company
Sun International Finance Corporation
Sun International, Inc.
Sun International Limited
Sun International (Puerto Rico), Inc.
Sun Investment Company
Sun Leasing Company
Sun Note Corporation, The
Sun Ocean Ventures
Sunoco Credit Corporation
Sunoco De Chile, LTDA
Sunoco Disc, Inc. (inactive)
Sunoco Energy Development Co.
Sunoco Home Comfort Inc.
Sunoco Inc.
Sunoco, Inc.
Sunoco International Limited (owned by British Sun Oil Company, Limited)
Sunoco Limited
Sunoco Overseas, Inc.
Sunoco Overseas Limited
Sunoco Petrochemicals Limited (owned by Sunoco Overseas, Inc.)
Sunoco Science and Technological Services, Inc.
Sunoco Terminals, Inc. (DE)
Sunohio
Sun Oil Company (Belgium) N.V.
Sun Oil Company of Canada Limited
Sun Oil Company (Nederland) B.V.
Sun Oil Export Company
Sun Oil GMBH
Sun Oil Line Company of Michigan
Sun Pipe Line Company
Sun Pipe Line Company of Delaware
Sun Oil Power Services Company

Sun Oil Trading Company
Sunolin Chemical Company
Sun Overseas Capital B.V.
Sun Overseas Capital N.V.
Sun Overseas Finance N.V.
Sun Pipe Line Services Co.
Sun Refining and Marketing Company
Sun Securities Corporation, The
Sun Services Corporation
Sun Ship, Inc.
Sun Transport, Inc.
Sun Tech, Inc.
Sun Terminals, Inc.
Sun Terminals, Inc. of Louisiana
Suntide Refining Company
Sun Trading (Caribe) Limited
Sun Ventures, Inc. (DE)
Sun Ventures, Inc. (PA)
Sweetwater Coal Development Co.
Super Go Marketers, Inc.
Tennessee Resources Corporation
Texas Sun Shipping, Inc.
Texoma Pipe Line Company
Thill Oil Company, Inc.
Thunderbird Stations, Inc.
Second Thunderbird Stations, Inc.
Third Thunderbird Stations, Inc.
Fourth Thunderbird Stations, Inc.
Tiny Tote, Inc.
Toledo Refining, Inc.
Totem Ocean Trailor Express, Inc.
Travelers Oil Company, Inc. (merging into Mid-State)
Tri-State Stop-N-Go, Inc.
TTT, Inc.
Tulsa Refining, Inc.
Universal Audio, Inc.
Van Salt Water Disposal Company
Vansant Coal Corporation (inactive)

Virginia Sun Shipping Co., Inc.
VLM Corporation, The
Walter Norris Corporation
Warbonnet Company
Weiland Computer Group, Incorporated, The
Welland Shipping Company, Inc.
Western Sun Shipping, Inc.
West Texas Gulf Pipe Line Company
West Virginia Resources Corporation
White River Shale Oil Corporation
Wolf Creek Coal Company
Yabucoa Sun Oil Company, Inc.
Your Party Stores, Inc. (being dissolved)
Zelco, Inc.
Zippy Mart, Inc.
Zippy Mart of Alabama, Inc.
Zippy Mart of Georgia, Inc.
Zippy Mart of South Carolina, Inc.
Zippy Mart Properties, Inc.

GULF OIL CORPORATION:

A/S Jargul and Co. K/S
AB Djurgardsberg
Adela Investment Company, S.A.
Afran Transport Company
Agricultural Anhydrous Ammonia Co. Ltd.
Albert Rose Chemicals, Ltd.
Alberta Products Pipe Line Ltd.
Alberta Underground Storage Limited
Allied-General Nuclear Services
Andogras S.A. (Switzerland)
Asia Polymer Corp.
Autobahn-Raststaette Wuerenlos Ag
Aviation Fueling Services-GT&T International Aviation Sales
Balinesian Gulf Oil Limited
Britama Tankers Limited
Britamco Limited
British Kewanee, Inc.
Canada Systems Group (EST) Limited

Cansulex Limited
Carboquimica, S.A.
Caribbean Gulf Refining Corporation
Carnduff Gas Limited
Cayman Kewanee Ltd.
The Central Pipeline Company Limited
Chicago Wire Goods Company
China Gulf Oil Company Limited
China Gulf Plastics Corporation
Chinhae Chemical Company, Ltd.
Colombian Gulf Oil Company
Colonial Pipeline Company
Commercial Alcohols Limited
Compagnie D'Investissement Combustibles De Reacteurs A Haute Temp
Compania Petrolera Aguarico, S.A.
Componentes Industriales Mexicanos, S.A.
"Condor" Industria Quimica, S.S.
Coser S.A.
Crediton Enterprises, Inc.
Delaware Bay Transportation Company
Det Gronlandske Olieaktieselskab
Dixie Pipeline Company
Eastern Gulf Oil Company Limited
Econ Oil (1977) Inc.
Emery Joint Venture
Ethyleen Pijpleiding Maatschappij (Belgium) S.A.
Ethyleen Pijpleiding Maatschappij (Nederland) B.V.
Explorer Pipeline Company
The "400" Oil Company
G & C Realty Limited
The Gaelic Oil Company Limited
GAZ Propane Blanchard Ltd.
GEA/Power Cooling Systems, Inc.
General Atomic Company
General Atomic Europe-GMBH-Dusseldorf
General Atomic Europe-GMBH-Zurich
Glen Park Gas Pipe Line Company Limited

Global Energy Operations & Management Company-International
Global Energy Operations & Management Company-Limited
Gobles Oil and Gas Limited
G.S. Equipment and General Supply
Gulf Asian Investments Company Limited
Gulf Benzin A/S
Gulf Canada Limited
Gulf Canada Petroleum Inc.
Gulf Canada Resources Inc.
Gulf Canada Resources Leasing Inc.
Gulf Chemicals International, Inc.
Gulf Ecuatoriana de Petroleo, S.A.
Gulf Europe Company
Gulf Exploration Company
Gulf Fujairah Petroleum Limited
Gulf-Gas (Sweden) Aktiebolag
Gulf International Company
Gulf International Trading-Far East
Gulf Iran Company
Gulf Italiana S.P.A.
Gulf Kuwait Company
Gulf Marine and Services Company, Limited
Gulf Minerals Canada Limited
Gulf Musandam Petroleum, Limited
Gulf Offshore Ras Al Khaimah Petroleum Limited
Gulf Oil A/S
Gulf Oil Canada-Greenland A/S
Gulf Oil Chemicals Company Asia, Limited
Gulf Oil Company (Hong Kong) Inc.
Gulf Oil Company (Nigeria) Limited
Gulf Oil Company (Portugal) Limitada
Gulf Oil Egypt Limited
Gulf Oil European Company
Gulf Oil Export Company
Gulf Oil (Great Britain) Limited
Gulf Oil (Ireland) Ltd.
Gulf Oil (Luxembourg) S.A.

Gulf Oil Mideast Trading Company
Gulf Oil (Nederland) B.V.
Gulf Oil (Nederland) Exploration and Production Company B.V.
Gulf Oil of Colombia Limited
Gulf Oil Pakistan Limited
Gulf Oil Raffinaderij B.V.
Gulf Oil Ras Al-Khaimah Limited
Gulf Oil Refining A/S
Gulf Oil Refining Limited
Gulf Oil Services, Inc.
Gulf Oil Suez Limited
Gulf Oil (Switzerland)
Gulf Oil Terminals (Ireland) Limited
Gulf Oil Trading Company Limited
Gulf Oil Trading Investments Limited
Gulf Oil (U.K.) Limited
Gulf Oil Zaire S.A.R.L.
Gulf Oman Petroleum, Limited
Gulf Overseas Trading, Inc.
Gulf Petroleum S.A.
Gulf Sales and Supply, Inc.
Gulf Supply and Distribution Company Limited
Gulf Technology Europe B.V.
Gulf Transport Company Aktiebolag
Gulf U.K. Offshore Exploration Company, Limited
Gulf (U.K.) Offshore Investments Limited
Harshaw-Bryce & Co. Pty. Ltd.
Harshaw-Murata Kabushika Kaisha
Harshaw-Juarez S.A. de C.V.
Harshaw Cabo & Cia., S.A.
The Harshaw Chemical Company
Harshaw Chemical of Canada Ltd.
Harshaw Chemicals Limited
Harshaw Chemie B.V.
Harshaw Chemie G.M.B.H.
Harshaw Chemie S.A.R.L.
Harshaw Galvanotecnia

Harshaw Holland N.V.
Harshaw International Corporation
Harshaw Nuclear Electronics Inc.
Harshaw Quimica Ltda.
Hochtemperatur Reaktorbau GMBH
Ico Pinturas, S.A.
Industrial Nickel, Inc.
Industrias Vencedor S.A.
Insco Holding & Finance Company N.V.
Insco Limited
Interprovincial Pipe Line Limited
Interquimica S.A.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Java Gulf Limited
Kayeye Insurance Company, Ltd.
Kentucky Anfo Inc.
Kewanee Industries, Inc.
Kewanee Oil Company (U.K.) Limited
Kewanee Oil Company (U.K.) Limited Gabon
Kewanee Overseas Oil Company
Key International Drilling Co. Limited
Key Perfuracoes Maritimas Ltda.
Keydril Australia Inc.
Keydril (Nigeria) Limited
Keydril Limited
Kupan International Company
Kuwait Oil Company Limited
Kuwait Oil Company Trustees Limited
Laurel Pipe Line Company
London Oil Refining Company Limited
Mainline Pipelines Limited
Maple Insurance Limited
Mene Grande Oil Company
Michigan Stations Personnel Services
Michigan Stations, A Division of Bulk Petroleum Corporation
Mid-Atlantic Chemical Corporation S.A.
Mid-Valley Pipeline Company

Midwest Carbide Corporation
Millmaster Onyx (Canada) Ltd.
Millmaster Onyx Corporation
Millmaster Onyx G.M.B.H.
Millmaster Onyx International Corporation
Millmaster Onyx U.K.
Millmaster Onyx Western Corporation
Montreal Pipe Line Limited
Morrow Fuel Oil Sales Ltd.
Mozambique Gulf Oil Company
Nedgulf Tankers B.V.
Netherlands Kewanee, Inc.
Newfoundland Propane Limited
New Frontiers Limited
Niugini Gulf Oil Pty. Limited
North River Energy Company
Northward Development Ltd.
Northwest Propane Ltd.
Northwest Terminals Ltd.
Norwegian Gulf Exploration Company A/S
Nova, An Alberta Corporation
Oil Shippers Service, Inc.
B.V. Olie Handelsvereeniging
Oklahoma Nitrogen Company
Pacific Gulf Oil Limited
Paloma Pipe Line Company
Panindustrial, S.A.
Peace Pipe Line, Ltd.
Pembroke Capital Company
Pembroke Cracking Company
Penrith Enterprises, Inc.
Permapint, S.A.
Petroleo Gulf do Brasil Limitada
Petroleos Gulf de Guatemala, S.A.
Petromont, Inc.
Petrosil Oil Company Limited
Plaschem International Company (Hong Kong) Limited
Plastigama, S.A.

Platte Pipeline Company
Pol Transport AB
Polyquimicos, S.A.
Produtos Quimicos Somox, Ttda.
Propet Company, Limited
Pyro Power Corporation
Raffinerie De Cressier S.A.
Redwater Water Disposal Company Limited
Resinas Andinas S.A.
Restaurang Aktiebolaget Brahehus
Rimbey Pipe Line Co., Limited
Rio Blanco Oil Shale Partnership
Ripon Enterprises, Inc.
Sarnie S.P.A.
Servico Limited
Silvertown Lubricants Limited
Solvent Refined Coal International, Inc.
Sorrento Electronics, Inc.
Spencer Quimica Mexicana, S.A. de C.V.
Stibium, Inc.
Sumatra Gulf Oil, Ltd.
Sunrise International Company Limited
Superior Propane Limited
Svensk Petroleum Administration A.B.
Svensk Petroleum Largring Tre A.B.
Svenska Aktiebolaget Alfred Olsen & Co.
Svenska Gulf Oil A.B.
Svenska Petroleum Forvalting A.B.
Syncrude Canada, Ltd.
Taita Chemical Corporation
Taiwan Plasticizer Corporation
Taiwan VCM Industries Corp.
The Trans Mountain Pipe Line Company
Trans Northern Pipe Line Company
Tunisian Gulf Exploration and Production Company
Venezuela Gulf Refining Company
Veritas Oil Company Aktiebolag
Western G.M.C. Pontiac Buick Ltd.
West Texas Gulf Pipe Line Company

NATIONAL COOPERATIVE REFINERY ASSOCIATION:

Farmers Union Central Exchange
Farmland Industries, Inc.
Growmark, Inc.
Jawhawk Pipeline Corporation
Land O'Lakes, Inc.
MFA Oil Company
Osage Pipeline Company
Seaway Pipeline, Inc.

ATLANTIC RICHFIELD COMPANY:

Alyeska Pipeline Service Company
Badger Pipe Line Company
Black Lake Pipe Line Company
Chapin, Kieley & Howe, Inc.
Colonial Pipeline Company
Cook Inlet Pipe Line Company
Delaware Bay Transportation Company
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
Flower Street Limited
Gas De Chile S.A.
Gravity Adjustment, Inc.
Hardy Oil Company
Hydrokem Performance Chemicals Company
Iricon Agency Ltd.
Kenai Pipe Line Company
Lavan Petroleum Co.
Montoro, Empresa Para La Industria Quimica
Nihon Oxirane Company, Ltd.
Oil Shippers Service, Inc.
Platte Pipe Line Company
Sinclair Venezuelan Oil Company
Techumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Trans Mountain Oil Pipe Line Company

CHAMPLIN PETROLEUM COMPANY:

Camas Prairie Railroad Company
Kansas City Terminal Railway Company
Longview Switching Company
Ogden Union Railway and Depot Company, The
Portland Terminal Railroad Company
Portland Traction Company
St. Joseph Terminal Railroad Company
Stauffer Chemical Company of Wyoming
Trailer Train Company
Uinta Development Company
Union Pacific Corporation

UNION OIL COMPANY OF CALIFORNIA:

Ace Gas, Inc.
Adobe Canyon Corporation
Alfa-Oeste Empreendimentos Participaoes E Servicos S/C Ltda.
Badger Pipe Line Company
Brea Agricultural Service, Inc.
Canyon Reef Carriers, Inc.
Chem Central Corporation
Chicap Pipe Line Company
Colonial Pipeline Company
Companhia Brasiliera De Metalurgia E Mineracao
Cook Inlet Pipe Line Company
Cymoly Corporation
Everglades Pipe Line Company
Gravcap, Inc.
Gravity Adjustment, Inc.
Inland Corporation
International Speedway Corporation
Kyung in Energy Company, Ltd.
Los Angeles Oil Company
Miami Valley Corporation
Mid-County Chemical Company
Midwest PMS, Inc.

Minera Unionoil Chile, Ltda.
Moreland/Tarnutzer-Hamilton
Moreland/Warmington
Moreland/Hapsmith Partnership
Moreland/John Martin Company
Moreland/Pulley
Oil Shippers Service, Inc.
P-M-S West, Inc.
Platte Pipe Line Company
Quebec Columbium, Ltd.
Sam Bo Real Estate Company, Ltd.
Sanitation, Inc.
Sepulveda Oil and Gas Company
Southern California Petroleum
South Saskatchewan Pipe Line Company
Southcap Pipe Line Company
Superior Deshler Company
Tecumseh Pipe Line Co.
Union/Westates Partnership
UNOCO (Philippines), Inc.
USZ Associates
USZ Hotel Venture
Van Salt Water Disposal Company
W. Cam Blk 595
West Texas Gulf Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Yellowstone Pipe Line Company

THE COASTAL CORPORATION (FORMERLY COASTAL STATES CORPORATION):

Coastal Terminals, Inc.
Geogas Enterprise S.A.
Jayhawk Pipeline Corp.
Productos Furanicos, S.A.D.E.C.V.

COASTAL OIL & GAS CORPORATION (FORMERLY GAS PRODUCING ENTERPRISES, INC.):

Coastal Corporation, The
Coastal Terminals, Inc.
Geogas Enterprise S.A.
Jayhawk Pipeline Corp.
Productos Furanicos, S.A.D.E.C.V.

EXXON CORPORATION:

Exxon Pipeline Company
Imperial Oil Limited
Reliance Electric Company

HUNT OIL COMPANY:

Hunt Financial Corporation
Hunt Consolidated Resources Corporation
Portal Pipe Line Company
Paloma Pipe Line Company
Winona Corporation

CRYSTAL OIL COMPANY:

Crystal Drilling Company
Crystal Exploration Company
Crystal Exploration and Production
Crystal Gas Resources
Crystal Program Ltd.

ANADARKO PRODUCTION COMPANY:

Alaskan Northwest Natural Gas Transportation Company
Anadarko Petroleum of Canada Ltd.
Archon International Company
Aurora Industries, Inc.
Basin Production Company
Bison Insurance Company, Ltd.
Calidad Insurance, Ltd.
Cogas Development Company

Dixene Corporation
Dixilyn-Field Drilling Company
Dixilyn-Field Drilling Ltd.
Dixilyn-Field International Drilling Company, S.A.
Dixilyn-Field Rocky Mountain Drilling Company
Dixilyn-Field-Swire Drilling Company
Dixilyn (International) A.G.
Dixilyn-Field (Nigeria) Limited
Dixilyn-Field 86, Inc.
Dixilyn-Field 87, Inc.
Dixilyn-Field Drilling Venture
Dixilyn-Field N.V.
Energy Pipeline International Company
Faskure Technology, Inc.
Illinois Napgas Company
Lachmar
National Distillers and Chemical Corporation
National Helium Corporation
Norden Limited Partnership
North Antelope Coal Company
Northern Border Pipeline Company
Northern Border Pipeline Corporation
Pan Alaskan Gas Company
Pan Border Gas Company
Pan Eastern Coal Company
Pan Gas Storage Company
Panhandle Canadian Gas, Limited
Panhandle Eastern Corporation
Panhandle Eastern Pipe Line Company
Paragon Data Systems, Inc.
Pelmar Company
Premier Coal Company
Ravencliffs Development Company
Rochelle Coal Company
Shore Base Services (Bermuda) Ltd.
Shore Base Services (Scotland) Ltd.
Southwest Gas Storage Company
Stingray Pipeline Company

The Youghiogheny and Ohio Coal Company
Trunkline Exploration Company
Trunkline Gas Company
Trunkline LNG Company
Trunkline Offshore Company
WyCoalGas, Inc.

IU INTERNATIONAL OIL & GAS, INC.:

Agrex Engineering Co., Ltd.
Agri-Spices International, Inc.
Agrobusiness Company, Limited
Agronomicas de Guatamala, S.A.
All States Terminals, Inc.
All States Trucking, Inc.
Beaver Brook Land Company
Beaver Brook Country Club, Inc.
Beaver County Trucking, Inc.
Bethel Township Water Company
Bigger Brothers, Inc.
BioEnergy Development Corporation
Boise Water Corporation
Brewer Chemical Corporation
Brewer Farms, Inc.
Brewer, Inc.
Brewer Orchards (South Pacific) Inc.
Brewer Properties, Inc.
Brewer Solomons, Inc.
Brewer Support Housing, Inc.
Butler Township Water Corporation
Byevalve Company
Byevalve Company, Ltd.
Capital City Water Company
CARIBLANCO S.A.
Caribou Water Works Corporation
Citizens Water Supply Company of Newtown, The
Clearview Water Supply Company
Cleveland Machine Hire Limited

Clymer Citizen Water Company
Coachman Insurance Company, The
Colorado Utility Management Corporation
Corporacion Chatarraven, C.A.
Conversion Systems, Inc.
Conversion Systems Technology Corp.
Conversion Systems (Texas) Inc.
Customized Transportation, Inc.
Cyclejack, Inc.
Dauphin Consolidated Water Supply Company
Distacom Communications (Alta.) Ltd.
East McKeesport Water Company
Eastport Water Company
Earth Management, Inc.
Echo Bay Mines Ltd.
Edmonton Telephone Answering Service Ltd.
Ellsworth Water Company
Empresa Agricola El Pacayal, S.A.
Envirosafe, Inc.
Envirosafe Services of Georgia, Inc.
Envirosafe Services of Idaho, Inc.
Envirosafe Services of Iowa, Inc.
Envirosafe Services of Pennsylvania, Inc.
Envirosafe Services of Texaco, Inc.
Expresa Agropecuaria Patzulin, S.A.
Expressway Transportation System, Inc.
Fleetway Insurance Limited
Fox Hunt Farms, Inc.
Freeport Water Company
Galeton-Eldred Water Company
Gemini Trucking, Inc.
General Securities Corp.
General Waterworks Corporation
General Waterworks Corporation of Pine Bluff, Arkansas, Inc.
General Waterworks Management and Service Company
Greenville Water Company
Guardian Financial Corporation

Guardian Life Underwriters, Inc.
Guatrex Services, Ltd.
G.W.C. Data Service Corporation
G.W. Service Corp.
Hackett, Clarence A., Inc.
H. and H. Equipment Corp.
Hawaiiana Investment Co., Inc.
Hawaiian Insurance & Guaranty Company, Limited, The
Helm's Salvage, Inc.
High Ridge Water Supply Company
Hills-McCanna Limited
Hilo Coast Processing Company
Hilo Transportation & Terminal Co., Inc.
Hobart-McIntosh Paper Company
Hoosier Water Company, Inc.
Illinois Municipal Water Company
IMS Caribbean Operations, Ltd.
IMS Holdings, Inc.
IMS Intermetal de Chile Limitada
IMS Japan Ltd.
IMS Lycrete, Inc.
IMS Lycrete Egypt, Ltd.
IMS Lycrete France, S.A.
IMS Lycrete Limited
IMS Lycrete (London) Limited
IMS Nordiska International Mill Service AB
IMS Rautohuolto OY
IMS Lycrete S.A.
IMS-Schlacken-und Metallaufbereitung GmbH
IMS-Sodynad Holdings, S.A.
IMS-Sodynad, s.a.r.l.
IMS Teesside Ltd.
Independent Adjustment, Inc.
Independent Freightway, Inc.
Industria Guatemalteca de Macadamia, S.A. (Inguamasa)
Intermetal Mexicana S.A.
International Metals Recovery, Inc.
International Mill Service, Inc.

International Molasses Limited
International Utilities Corporation
International Utilities Overseas Capital Corporation
IU Air Service, Inc.
IU Barbados Limited
IU Europe, Ltd.
IU Finance Canada Limited
IU International Holdings Limited
IU International Management Corporation
IU International Oil & Gas, Inc.
IU Investment Corporation
IU Land Corporation
IU Land Development Corporation
IU Liberian Finance Company
IU North America Finance, Inc.
IU Oil & Gas Limited
IU Overseas Finance N.V.
IU Overseas Transportation Ltd.
IU Resolute Corporation
IUUK Corporation
Jacksonville Suburban Utilities Corporation
Jersey Shore Water Company
Lambertville Water Company
Lifermag S.A.
Loyquip S.A.
Lycrete Limited
Lincoln Water Corporation
Mars Hill & Blaine Water Company
Mauna Kea Sugar Company, Inc.
Mauna Loa Macadamia Nut Corporation
Mechanic Falls Water Company
Mechanicsburg Water Company
Metric Associates
Millinocket Water Company
Minseco Limited
Monte de Oro, S.A.
Movig Limited
MTL Corporation

Namolco de Mexico, S.A.
Namolco AG
Namolco GmbH
Namolco (Panama) S.A.
Namolco S.r.l.
Narvon Products Corp.
National Molasses Company, Inc.
New Milford Water Company, The
New Rochelle Water Company, The
Newtown Water Company, The
Nickels Water Company
North Berwick Water Company, The
Nosroc Corp.
Octoraro Water Company
Olokele Sugar Company, Limited
O.N.C. Forwarding
Orida Investment Corporation
Owego Water Works
PAC Finance Corporation
Pacific Intermountain Express Co.
Pagette Airsignals Ltd.
Pigeon Point Research Center, Inc.
P.I.E. Air Freight Forwarding, Inc.
P.I.E. Forwarding, Inc.
P.I.E. International, Inc.
P.I.E. Transport AB
P.I.E. Transport A/S
P.I.E. Transport, Inc.
P.I.E. Transport OY
Pioneer Trucking, Inc.
Preston Utilities Corporation
Punalu'u Water and Sanitation Corporation
Pyrco Industries
Road Materials (Middlesbrough) Limited
Round Valley, Inc.
Round Valley Realty, Inc.
RTL Holdings, Inc.
Russellville Water Company, Inc.

Ryder Forwarding, Inc.
Ryder Truck Liner, Inc.
Ryder Truck Lines, Ltd.
Seamountain-Hawaii Ranch Company, Inc.
Select Foods, Inc.
Signature Brands, Inc.
Skowhegan Water Company
Sociedade Brasileira de Recuperacao de Metals (Sombremetal) Ltda.
South Gate Water & Sewer Co., Inc.
South Pacific Agronomica Company
Southwest Fabricating & Welding Co., Inc.
Special Carriers, Inc.
Special Carriers Leasing, Inc.
Stewartson Water Company
Telephone Answering Service Limited
Toms River Water Company
Transportation Teleprocessing Systems, Inc.
Trans-Service Express, Inc.
Trans-Services Investment Corporation
Trevorton Water Company, The
2522 Covington Street Corporation
Unijax, Inc.
Unijax Realty Company
United National Insurance Company, Limited
Valve Systems International, Inc.
Vanguard Contract Carrier Inc.
Volcano Golf & Country Club, Inc.
VSI (Valve Systems International) Limited
Wailuku Sugar Company
Wakefield Water Company
Warrenville Water Company
West Lafayette Water Company, Inc.
Willow Grove Shipping Company Limited
Wilmington Suburban Water Corporation
Woodbury Water Company, The
Wrightsville Water Supply Company
X-Y Truck Brokers, Inc.

SANTA FE ENERGY COMPANY:

The Atchison, Topeka and Santa Fe Railway Company (Del.)
Advertising Direction, Inc. (Del.)
Alameda Belt Line (Del.)
B & C General Agency, Inc. (Tex.)
The Clinton and Oklahoma Western Railroad Company (Okla.)
The Dodge City and Cimarron Valley Railway Company (Kan.)
Fresno Interurban Railway Company (Cal.)
Gallo Wash Coal Company (Del.)
The Garden City, Gulf and Northern Railway Company (Kan.)
The Gulf and Inter-State Railway Company of Texas (Tex.)
Gulf Central Pipeline Company (Del.)
Gulf Central Storage and Terminal Company (Del.)
Gulf Central Storage and Terminal Company of Nebraska
Haystack Mountain Development Company (Del.)
Hospah Coal Company (Del.)
The Kansas Southwestern Railway Company (Kan.)
Kirby Forest Industries, Inc. (Del.)
Los Alamos Constructors, Inc. (N.M.)
Los Angeles Junction Railway Company (Cal.)
McKee Development Services, Inc. (Del.)
The Oakland Terminal Railway (Cal.)
Oklahoma City Junction Railway Company (Okla.)
Pintada Coal Company (Del.)
Rio Grande, El Paso and Santa Fe Railroad Company (Tex.)
Robert E. McKee, Inc. (Nev.)
San Diego Pipeline Company (Cal.)
Santa Fe Energy Company (Tex.)
Santa Fe Energy Company of Seychelles, Inc. (Del.)
Santa Fe Energy Products Company (Del.)
Santa Fe Forwarding Company (Del.)
Santa Fe Industrial Realty Company (Del.)
Santa Fe Industries, Inc.
Santa Fe Land Improvement Company (Cal.)
Santa Fe Mining, Inc. (Kan.)
Santa Fe Natural Resources, Inc. (Del.)

Santa Fe Oil Company (Del.)
Santa Fe Pacific Railroad Company (Act of Congress)
Santa Fe Pipeline Company (Del.)
Santa Fe Pipelines, Inc. (Delaware) (Del.)
Santa Fe Terminal Services, Inc. (Del.)
Santa Fe Towers Land Company (Cal.)
The Santa Fe Trail Transportation Company (Kan.)
Santa Fe Transportation Company (Cal.)
Security Guard Service, Inc. (Tex.)
Southwest Pipe Line Company (Del.)
St. Joseph Terminal Railroad Company (Del.)
Star Lake Railroad Company (Del.)
Sunset Railway Company (Cal.)
Toledo, Peoria & Western Railroad Company (Del.)
Transit Ice Company (Ill.)
Walker-Kurth Lumber Company (Tex.)
The Zia Company (Del.)

FARMERS CRUDE PRODUCTION CO. (FORMERLY FARMERS PETROLEUM COOPERATIVE, INC.):

Farmers Petroleum Cooperative, Inc.

PETROLEUM CORPORATION OF TEXAS:

Bates Coal, Inc.

The following corporate petitioners do not have any parent companies, subsidiaries (except wholly owned subsidiaries), or affiliates:

Braden-Zenith, Inc.
Energy Consumers & Producers Association, Inc.
Herndon Drilling Company
Muskegon Development Company
Petroleum Management, Inc.
Pioneer Operations Company, Inc.
Rhude & Fryberger, Inc.
Ruthven, Inc.

Sklar & Phillips Oil Company
Stelbar Oil Corporation, Inc.
Suburban Propane Gas Corporation
Wico Oil Company
Will I. Lewis Enterprises, Inc.
Wood Oil Company

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ALEXANDER L. STEVAS,
CLERK

No. 82-628

In the Supreme Court of the United States

OCTOBER TERM, 1982

ENERGY RESERVES GROUP, INC., ET AL., PETITIONERS

v.

DONALD PAUL HODEL, SECRETARY OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the court of appeals correctly upheld regulations of the Department of Energy prohibiting the inclusion of non-producing "injection" wells for purposes of applying the statutory exemption from petroleum price controls for properties with an "average daily production" per well of 10 barrels or less of crude oil.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-628

ENERGY RESERVES GROUP, INC., ET AL., PETITIONERS

v.

DONALD PAUL HODEL, SECRETARY OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 690 F.2d 1375. The opinion of the district court (Pet. App. 33a-110a) is reported at 520 F. Supp. 1232.

JURISDICTION

The judgment of the court of appeals (Pet. App. 217a) was entered on July 29, 1982. A petition for rehearing was denied on September 10, 1982 (Pet.

App. 219a). The petition for a writ of certiorari was filed on October 8, 1982. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. 1904 note, and 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth at Pet. App. 221a-227a.

STATEMENT

1. In August 1973, the Cost of Living Council imposed price controls for crude oil and other petroleum products, pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note. The controls were imposed in an effort to halt the inflationary spiral caused by rapidly rising domestic oil prices (Pet. App. 8a). Several months later, in November 1973, Congress enacted an exemption from price controls for crude oil produced from "stripper wells," defined as properties with an "average daily production * * * per well" of not more than 10 barrels of crude oil or natural gas liquids.[1] Congress directed the agency responsible for implementing the price control program to issue regulations implementing the stripper well exemption. The conferees stated that the exemption was to be "narrowly defined and prudently administered." H.R. Rep. No. 93-624, 93d Cong., 1st Sess. 29 (1973).

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[1] The exemption originally was enacted in 1973 as Section 406 of the Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 590. Shortly thereafter, the exemption was made part of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 *et seq.*, which became the statutory authority for the entire petroleum price control program.

On November 21, 1973, the Cost of Living Council issued a regulation implementing the stripper well exemption. The regulation provided in part that only "wells which produced crude petroleum and petroleum condensates" could be counted in calculating "average daily production." 38 Fed. Reg. 32494 (1973); Pet. App. 223a. Members of the petroleum industry argued that the agency also should allow inclusion of non-producing wells, such as injection wells, in the calculation of average daily production.[2] Injection wells do not emit crude oil, but rather are used to inject water (or other material, such as gas or steam) into the ground to maintain reservoir pressure, which aids in crude oil production from other wells. Inclusion of such non-producing wells would have had the effect of lowering average daily production per well, thus significantly increasing the number of properties that would have qualified for the exemption from price controls.[3] In December 1974, following numer-

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[2] Various types of wells may exist on producing properties. In addition to producing wells, which emit crude oil, there may be shut-in wells (wells that have been closed down and are no longer producing) and salt water disposal wells (used to dispose of salt water emitted with crude oil). Other types of wells are used in connection with secondary recovery projects, which use various artificial means to increase the amount of production from a reservoir. These wells include injection wells (used to inject fluids into the reservoir, thereby increasing pressure underground), water source wells (used to obtain water for injection purposes), and observation wells (used to determine whether injected fluid is moving properly in the underground reservoir). See C.A. App. 9082, 9094, 9233, 9419, 9424, 9900-9903, 10013-10014. ("C.A. App." refers to the joint appendix filed in the court of appeals).

[3] As the court below explained, "[i]nclusion of injection wells in the calculation of average daily production would en-

ous comments and inquiries by the industry, the agency[4] issued Ruling 1974-29 (39 Fed. Reg. 44414 (1974); Pet. App. 226a-227a). The Ruling was designed to "put firmly at rest" (*id.* at 154a) the agency's official position that only producing wells could be used to calculate average daily production for purposes of exemption from price controls. The Ruling specified that all non-producing wells were to be excluded from the calculation, including injection wells, shut-in wells, disposal wells, dry wells, and spent wells (*id.* at 227a).

The stripper well exemption was repealed for a brief period during 1976.[5] However, in August 1976, Congress reenacted the exemption as part of the Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 *et seq.* At that time Congress specifically rejected attempts to enlarge the exemption in a manner that would have allowed inclusion of injection wells in the well count for purposes of calculating average daily production (Pet. App. 17a). Thereafter, following a period for notice and comment, the agency adopted a stripper well regulation that was substantially identical to the earlier regula-

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able a producer to divide his total production from a property by a greater number of wells, thereby allowing more production to qualify for the exemption by falling under 10 barrels per day per well" (Pet. App. 13a n.5).

[4] The term "agency" when used in this brief refers to the Department of Energy and its predecessors, including the Federal Energy Administration and the Federal Energy Office. These agencies took over from the Cost of Living Council the responsibility for administering the petroleum price control program.

[5] Congress repealed the exemption in December 1975 in the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 *et seq.*

tion. 41 Fed. Reg. 48319, 48323 (1976); Pet. App. 225a-226a.

On January 28, 1981, President Reagan removed price controls for crude oil and refined petroleum products. Exec. Order No. 12287, 46 Fed. Reg. 9909.

2. In late 1976 and early 1977, three cases were filed in the United States District Court for the District of Kansas challenging the agency's interpretation of the stripper well exemption.[6] The district court consolidated the three cases. In January 1978, it entered summary judgment against the agency on the ground that Ruling 1974-29 was "legislative" in nature and therefore was procedurally invalid because it had been issued without use of the notice and comment procedures prescribed by the Administrative Procedure Act, 5 U.S.C. 553. *Energy Reserves Group, Inc.* v. *Federal Energy Administration*, 447 F. Supp. 1135 (D. Kan. 1978) (Pet. App. 111a-138a). In October 1978, the Temporary Emergency Court of Appeals (TECA) reversed on the ground that the Ruling was clearly interpretative, rather than legislative, so that the notice and comment procedures of the Administrative Procedure Act did not apply. *Energy Reserves Group, Inc.* v. *Department of Energy*, 589 F.2d 1082 (Pet. App. 139a-195a). Judge Becker, who authored the lead opinion, observed that the Ruling was a "reasonable contemporaneous construction" of the statute (*id.* at 168a). In a subsequent decision denying a petition for writ of mandamus, *Duncan* v. *Theis*, 613 F.2d 305 (1979) (Pet. App. 205a-216a), the TECA concluded that the con-

[6] A number of challenges to the agency's interpretation of the stripper well exemption were filed in other courts. In June 1979, the Judicial Panel on Multidistrict Litigation transferred those actions to the District of Kansas for consolidation with the cases pending there (Pet. App. 39a).

formity of the regulation with the statute was an issue still to be resolved, but it characterized as "persuasive" Judge Becker's earlier suggestion that the agency's regulation and interpretation reflected a reasonable construction of the statute (*id.* at 211a-212a).

3. On remand, the district court concluded that the stripper well regulation was outside the agency's statutory authority, since "Congress intended injection wells to be included in the well count" (Pet. App. 40a). The court went on to hold that "even if the statute did not mandate including injection wells, the manner in which the Department excluded the wells from the well count was arbitrary and capricious" (*ibid.*).

The court of appeals again reversed (Pet. App. 1a-32a). Based on a comprehensive review of the language and legislative history of the stripper well exemption, the TECA concluded that there was "clear and convincing evidence that Congress intended to include only 'wells that produced crude petroleum'" (*id.* at 25a). The TECA rejected the argument that the agency's interpretation was arbitrary and capricious, noting that there was ample justification for that interpretation (*id.* at 25a-32a).

ARGUMENT

1. The decision below raises no question that warrants review by this Court. The TECA has decided a narrow issue of statutory construction relating to a specialized program of petroleum price controls. Petitioners, members of the regulated industry, simply disagree with the TECA's conclusion that the interpretation of the agency that administers the statute is reasonable and instead advance their own interpretation. The issue is unlikely to recur, because the

petroleum price controls were discontinued almost two years ago. See page 5, *supra*.[7] Nor are there likely to be conflicting decisions on this issue, because cases formerly pending around the country were transferred to the district court below and consolidated. See page 5 n.6, *supra*. The court that rendered the unanimous decision challenged by petitioners was established by Congress specifically to ensure expert and uniform treatment of issues such as the one raised here.[8] See *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245 (1982). The TECA has considered carefully and thoroughly petitioners' challenges to the agency's interpretation and has concluded in the decision below and in other decisions that the agency's regulation is reasonable.[9] There is no need for further review.

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[7] Petitioners argue (Pet. 15) that this case has significance for the future because the effect of the windfall profit tax depends in part on the definition of "stripper well property within the meaning of the June 1979 energy regulations," referred to in 26 U.S.C. (Supp. V) 4991(d)(1)(A). But the outcome of this case does not affect the meaning of the regulatory definition; rather, the issue here is whether that definition is consistent with the statutory stripper well exemption. Even if the court below had found the agency's regulatory interpretation to be invalid, this would not change the fact that Congress has adopted it for the separate purpose of the windfall profit tax.

[8] See 12 U.S.C. 1904 note; S. Rep. No. 92-507, 92d Cong., 1st Sess. 10-11 (1971); H.R. Rep. No. 93-748, 93d Cong., 1st Sess. 12-13 (1973).

[9] See Pet. App. 1a-32a; *id. at* 139a-195a; *id.* at 205a-216a; see also *Wiggins Brothers, Inc.* v. *Department of Energy*, 667 F.2d 77, 89 (Temp. Emer. Ct. App. 1981), cert. denied, No. 81-1191 (Mar. 29, 1982).

Petitioners suggest (Pet. 17) that they have been denied the opportunity to address the validity of the agency's con-

2. In any event, the decision of the TECA is clearly correct. Congress expressly delegated to the agency the authority to issue regulations implementing the stripper well exemption. See Pet. App. 221a-223a. The agency issued both regulations and a 1974 ruling explaining how the exemption would be administered. The TECA correctly concluded that the agency's consistent interpretation of the exemption in a manner that excluded injection wells and other non-producing wells from the well count used to calculate average daily production was in accord with the language and history of the statute.[10]

The plain words of the statute support the agency's interpretation. The stripper well exemption applies to properties with an "average daily production * * * per well" of not more than 10 barrels of crude oil or natural gas liquids. See Pet. App. 221a-223a. The statute makes no mention of injection wells. The language strongly suggests that Congress was referring only to those wells that actually produce, or emit, crude oil. As the TECA observed, a "reasonable read-

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struction of the statute. On the contrary, petitioners have had several opportunities to address this issue, and the court below has considered their arguments carefully on each occasion. The TECA's decision on its face negates petitioners' claim.

[10] Petitioners note (Pet. 6) the district court finding that on some occasions in 1973 agency personnel responded to requests from industry members by stating that injection wells were to be included in the well count. Assuming, arguendo, the correctness of the finding, these instances occurred prior to the issuance of Ruling 1974-29. Moreover, the district court conceded that "the bulk of the advice given by the agency was to the effect that injection wells should not be counted" (Pet. App. 67a). The district court cited no instance of a published agency interpretation that conflicted with Ruling 1974-29.

ing would distinguish injection from producing wells" (*id.* at 31a).[11]

The agency's interpretation also is more consistent with legislative intent than that of petitioners. When Congress first enacted the exemption the conferees explained that stripper wells were defined as those "wells whose average daily production does not exceed ten barrels per well." H.R. Rep. No. 93-624, 93d Cong., 1st Sess. 29 (1973). The purpose of the exemption from price controls was to avoid any shutdown of production from this particular group of wells. *Ibid.* There is no indication that Congress meant to extend the exemption to apply to wells with higher production rates merely because injection processes were used to maintain those rates. Rather, the conferees stressed that the exemption "is not intended to confer any benefit on the owners and operators of wells producing in excess of ten barrels per day." *Id.* at 30. Like the statute itself, the legislative history contained no mention of injection wells.

The conferees made clear that the exemption was intended to be "narrowly defined and prudently administered" and that they wished to insure that "the incentive being granted is properly limited in accord

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[11] Petitioners suggest (Pet. 4) that other federal agencies do not differentiate between injection wells and producing wells in certain contexts. Assuming, arguendo, that petitioners have characterized correctly the practices of other federal agencies, those practices are not material to the interpretation of the statutory exemption at issue here. The TECA, in an earlier decision in this case, correctly dismissed the cited practices as "unpersuasive" and as "immaterial and obscure references, unmentioned in any legislative history of [the Emergency Petroleum Allocation Act] or of [the Trans-Alaska Pipeline Authorization Act] * * *" (Pet. App. 168a-169a).

with congressional intent." H.R. Rep. No. 93-624, *supra*, at 29. In the same vein, the conferees stated (*id.* at 30):

> The Congress intends that the provisions of this section will be strictly enforced and regulated by the administering agency to insure that the limited exemption of this class of wells for the express purpose described * * * is not in any way broadened.

These statements from the conference report establish clearly that Congress intended that the exemption be construed narrowly and that it charged the agency with administering the exemption in a manner that would preserve its limited nature. The expansive reading urged by petitioners is directly contrary to these expressions of legislative intent.[12]

The agency's interpretation of the stripper well exemption also is consistent with Congress's intention that the regulations be designed to "insure that an administratively workable system is established which does not permit abuse." H.R. Rep. No. 93-624, *supra*, at 31. See also *id.* at 30 (stating that the regulations "shall be so designed as to provide safeguards against any abuse, over-reaching or altering

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[12] Statements made by various legislators reflect an expectation that the exemption would apply to only a small percentage of the nation's crude oil production (Pet. App. 23a-24a). The TECA found that "the amount of oil subject to the exemption under [petitioners'] interpretation is much greater than originally anticipated and intended" (*id.* at 24a). Petitioners argue (Pet. 12 n.3) that this conclusion is based on misunderstanding of a statement by petitioners' counsel during oral argument. Even if this were so, petitioners' own representations concerning the amount of money involved in this litigation (*id.* at 2, 14) suggest the magnitude of the exemption they seek.

of normal patterns of operations to achieve a benefit under this section which would not otherwise be available"). Various types of wells found on producing properties may be necessary for the production of oil.[13] It is virtually impossible to measure the contribution to production made by any of these wells, including injection wells. See C.A. App. 9912. Furthermore, even when injection wells initially operate to enhance production from other wells, they may thereafter become unnecessary and contribute nothing to production. See *id.* at 9095, 9602, 9900, 9912-9913. Thus, the agency's conclusion that only producing wells should be used in determining eligibility for the stripper well exemption was consistent with the congressional goals of both administrative workability and prevention of abuse.

Moreover, as the TECA correctly concluded, Congress's re-enactment of the stripper well exemption without change in 1976 indicates approval of the agency's interpretation.[14] See, *e.g.*, *Haig* v. *Agee*, 453 U.S. 280, 300-301 (1981); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Commissioner* v. *Estate of Noel*, 380 U.S. 678, 681-682 (1965). The re-enactment here was not simply a case of congressional inaction.

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[13] In other litigation, the industry has sought to include other types of non-producing wells—shut-in wells and salt-water disposal wells—in the well count for purposes of the stripper well exemption. See, *e.g.*, *Sauder* v. *Department of Energy*, 4 Energy Mgmt. (CCH) ¶ 26,157 at 27,389 (D. Kan. July 9, 1979), aff'd, 648 F.2d 1341 (Temp. Emer. Ct. App. 1981).

[14] As the TECA noted (Pet. App. 25a), Congress also had extended the Emergency Petroleum Allocation Act on three previous occasions without disturbing the agency's interpretation of the exemption. See Pub. L. No. 93-511, 88 Stat. 1608; Pub. L. No. 94-99, 89 Stat. 481; Pub. L. No. 94-133, 89 Stat. 694.

Rather, Congress specifically rejected an attempt by Senator Bartlett to amend the statute by defining the term "well" to include injection wells (Pet. App. 17a). The TECA concluded, "[b]y these actions, we believe Congress spoke loudly, clearly and unequivocally that its intention was not to enlarge or expand upon the 'narrowly defined and prudently administered' exemption which it had originally mandated in the TAPAA Conference Report" (*id.* at 25a).

Petitioners' suggestion (Pet. 7, 19 n.8) that Congress was not aware of the agency's interpretation at the time it reenacted the exemption in 1976 in simply incorrect. Ruling 1974-29 was an official agency action published in the Federal Register and had been a matter of public record for over a year and a half when Congress reenacted the exemption. Thus, it can be presumed that Congress was aware of the interpretation. See *Lorillard* v. *Pons*, *supra*, 434 U.S. at 581. Moreover, in this case the agency's interpretation was specifically called to Congress's attention. The record contains congressional correspondence from 1974 and 1975 relating to complaints about the agency's exclusion of injection wells from the well count for purposes of the stripper well exemption. See C.A. App. 10599, 10604-10605, 10641-10642, 10647, 10680-10681, 10780, 11159, 11255-11261, 11631, 11633, 11652-11657, 11659. Moreover, the agency referred to its interpretation in a communication to Congress prior to the passage of the 1976 legislation. See *Communication from the Administrator, Federal Energy Administration*, H.R. Doc. No. 94-159, 94th Cong., 1st Sess. 3, 5 (1975). Finally, the unsuccessful attempt by Senator Bartlett in 1976 to amend the statute in a manner that would have reversed the agency's interpretation indicates that Congress was not only aware of the issue raised

by petitioners; it resolved it definitively in favor of the agency's position.[15]

Petitioners urge (Pet. 24-26) that the agency's interpretation must be incorrect because Congress intended to use the stripper well exemption to encourage use of secondary recovery techniques. Neither the language of the statute nor its history indicates that this was the purpose of the exemption. In fact, when Congress reenacted the exemption in 1976, it drew a sharp distinction between stripper well production, on the one hand, and secondary recovery techniques, such as the use of injection wells, on the other. In rejecting a Senate provision that would have allowed price increases for such secondary recovery projects the conferees stated:

> The conferees could not * * * agree to the provisions of the Senate amendment which would permit substantial price increases for commonplace secondary enhancement techniques such as water flooding and gas displacement. Moreover, the conferees did not believe it wise to attempt to create in rigid statutory language a special classification of domestic production which would be freed of price restraints. Unlike the case of stripper well production, for which there is both a long legislative and administrative history,

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[15] This case is clearly distinguishable from *Rowan Cos.* v. *United States*, 452 U.S. 247 (1981), and *United States* v. *Calamaro*, 354 U.S. 351 (1957), cited by petitioners (Pet. 19 n.8). In those cases there was no evidence that the interpretations at issue had been brought to Congress's attention. See *Rowan Cos.* v. *United States*, *supra*, 452 U.S. at 262; *United States* v. *Calamaro*, *supra*, 354 U.S. at 359. Moreover, in *Rowan*, unlike the present case, the Internal Revenue Service had issued formal rulings that were inconsistent with the disputed interpretation. 452 U.S. at 260-261.

> there is not common agreement as to the practicality, feasibility or cost-effectiveness of the various enhancement techniques employed throughout the industry.

S. Rep. No. 94-1119, 94th Cong., 2d Sess. 71 (1976); Pet. App. 16a. Both the original legislative history and the 1976 congressional action indicate that the stripper well exemption cannot be read as an open-ended mandate to encourage use of secondary recovery techniques. Rather, the exemption was designed to be a very limited exception to a broad regime of price controls. In declining to read the exemption in the expansive manner urged by petitioners, the agency has acted consistently with legislative intent.[16]

This Court has held on a number of occasions that considerable weight should be given to the interpretation of the agency charged with administering a statute. See, *e.g.*, *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 9 n.12; *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977). Particular weight should be given to the agency's interpretation when, as in this case, Congress has delegated to the agency the authority to promulgate regulations implementing the statute. See, *e.g.*, *Mourning* v. *Family Publications Service*,

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[16] Amici, the States of Texas, Oklahoma, and Wyoming, suggest that the decision of the court below will somehow interfere with their efforts to encourage producers of crude oil to use secondary recovery techniques. Since petroleum price controls were removed almost two years ago, there can be no effect on such current or future efforts by states. Moreover, nothing in the TECA's decision in any way prevents states from continuing or expanding their own programs of incentives.

Inc., 411 U.S. 356, 369 (1973).[17] Here, the TECA, after carefully reviewing the language and history of the stripper well exemption and the agency's interpretation of that exemption, concluded that the agency's regulations were reasonable. That conclusion is correct, and no further review is warranted.[18]

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[17] Petitioners argue (Pet. 20-22) that the agency's interpretation is not entitled to deference in this case, on the ground that the agency gave inadequate consideration to the treatment of injection wells. In light of the emergency nature of the petroleum price control program, there was justification for the failure to follow notice and comment procedures when the regulations were first issued. See Pet. App. 137a. During the following year the agency gave thorough consideration to arguments that injection wells should be included in the well count. See, *e.g.*, Pet. App. 67a-68a; C.A. App. 11257-11258. As the TECA found, the agency's conclusion was fully consistent with the language, history, and purpose of the exemption.

[18] Petitioners suggest (Pet. 15-16) that the TECA failed to rule on the validity of the agency's regulations, as opposed to the validity of Ruling 1974-29. That suggestion is incorrect. The court specifically referred to both the regulations and the Ruling (Pet. App. 7a, 32a). The court held unequivocally that "[*t*]*he stripper well regulations*, as interpreted by Ruling 1974-29, are neither arbitrary nor capricious" (*id.* at 32a) (emphasis added).

Petitioners also argue (Pet. 18-19) that the TECA did not take sufficient account of the findings of fact of the district court. This contention is without merit. The question of whether the agency's interpretation of the stripper well exemption was consistent with the statute or was arbitrary and capricious is a legal issue. Thus, any findings of fact were largely irrelevant to the TECA's conclusion. Moreover, the district court's finding that abuse of the stripper well exemption was unlikely (Pet. App. 84a) is not inconsistent with the TECA's conclusion (*id.* at 21a-23a, 30a-31a) that Congress was concerned with the potential for abuse and that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the agency could issue regulations that would minimize the possibility that such abuses would occur. Even if there may be differences of opinion concerning the likelihood of abuses, it is surely within the agency's discretion to conclude that a particular approach should be adopted in part because it would prevent any possible abuse. See, *e.g.*, *Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, No. 81-750 (June 28, 1982), slip op. 26-27.

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Respondents.

On Petition For A Writ Of Certiorari To The Temporary Emergency Court Of Appeals Of The United States

REPLY MEMORANDUM

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REPLY MEMORANDUM

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1. The government modestly fails to acknowledge the amount of money involved here and the widespread importance of this case to the petroleum industry. It is undisputed that thousands of individuals and businesses are affected and that upwards of one billion dollars already have been paid into escrow for distribution at the termination of litigation. Even though the program of federal petroleum price controls has ended, the substantial amount of private monies at stake itself is sufficient to warrant review. *See, e.g., United States* v. *Chicago, B. & Q. R. Co.*, 412 U.S. 401, 404-05 n.6 (1973).[1]

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[1] Moreover, it seems clear that the issue resolved in this case has substantial continuing importance under the windfall profit tax. *See* Pet. 15. The government's argument to the contrary, Br. in Opp. 7 n.7, assumes that Congress intended to fix the tax by reference to

No fewer than four states have filed briefs as *amici curiae* in this case. Three states, Texas, Oklahoma, and Wyoming, recognize that the decision below is contrary to their interests and urge that the petition be granted. One state, Illinois, believes that it will benefit from the decision below and for that reason urges denial. These states' participation, whether for or against the petitioners, emphasizes the importance of the case and the propriety of plenary review.

2. The government fails to come to grips with the serious deficiencies in its position.

a. It is beyond question, and the government does not contend otherwise, that the overriding congressional objective in enacting the exemption for stripper properties was to maximize production from existing reservoirs. *See* Pet. 23. The inclusion of injection wells in the well count furthers that objective.[2] Their exclusion from the well count hinders it. In the absence of a plain expression of congressional intent ruling out the inclusion of injection wells, and there is no such expression of intent, the statute should be construed in the manner that would further its principal objective.

b. For more than forty years, the Department of Interior has administered an essentially identical statutory provision relating to stripper properties under the Mineral Land Leasing Act of 1920 and has taken the position that injection wells "shall be counted as producing wells." 30 C.F.R. § 221.49(b). *See Marathon Oil Co.* v. *Kleppe*, 556 F.2d 982, 986 (10th Cir. 1977). At least some legislators had expected that precedent to be followed here. *See* note 8, *infra*. The government in this case has never explained why two federal agencies

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DOE's regulations even if those regulations themselves were invalid because contrary to congressional intent. That assumption, which is in the nature of a prediction about how the courts would construe the taxing statute, is dubious at best.

[2] The government has conceded this. *See* Pet. 26 n.12.

should be permitted to construe and apply identical statutory language in a diametrically opposite manner. Nor has it given any reason for believing that the Department of Interior's long-standing interpretation and practice were inapposite or unpersuasive guides to construction here.

c. Notwithstanding the fact that the Department of Interior has administered injection wells for more than four decades without any experience of manipulation or abuse,[3] the only substantive reason DOE has given for excluding injection wells from the well count in this case is the asserted need to guard against abuse. Not even this reason was given at the time the agency issued Ruling 1974-29. It emerged as the *post hoc* rationalization of the government's litigation counsel. On this basis alone, it should have been disregarded. *See* Pet. 22.

From the outset, the agency has jealously sought to insulate its proffered rationale from public scrutiny. Ruling 1974-29, of course, was promulgated without notice or opportunity for public comment.[4] Once this litigation had begun, the agency

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[3] A retired official of the Department of Interior, who had been responsible for administration of the regulations relating to injection wells, testified at trial. *See* Pet. App. B, pp. 55a-56a. No contrary evidence of abuse was either elicited or offered by the government.

[4] The government, quite misleadingly and without any citation to the record, portrays the industry as having an opportunity, before the agency issued Ruling 1974-29, to "argue[]," Br. in Opp. 3, and "comment[]," *id.* at 4, concerning the wisdom of excluding injection wells. The sad truth of the matter is that the agency adopted the interpretation stated in Ruling 1974-29 not only without requesting or receiving any comments from interested persons but also without informing itself about the practical consequences of its interpretation, without considering the treatment given injection wells by other federal and state agencies, and without referring to the statutory language or legislative history. *See* Pet. App. C, p. 132a; Pet. App. B, p. 96a; Pet. App. I, pp. 226a-227a. Moreover, the

vigorously resisted discovery into the basis for its action. *See* Pet. App. B, p. 39a. Finally, the industry was given the opportunity at trial to put the government's theory to the test of objective fact. After reviewing extensive evidence, *see id.* at 43a-52a, the district court unequivocally found that "the counting of injection wells has no greater potential for abuse than . . . excluding the counting of injection wells," *id.* at 84a.

Even though the government's basic theory had been exposed as nonsense, the court of appeals ignored the district court's finding and endorsed that theory anyway. *See* Pet. 18-19. The government seeks to paper this over by asserting that "any findings of fact were largely irrelevant to the TECA's conclusion." Br. in Opp. 15 n.18. But the court of appeals gave, as the "most important reason," Pet. App. A, p. 30a, for excluding injection wells, its own untutored opinion that "[i]ncluding injection wells in the count could possibly lead to a serious abuse of the purposes of the exemption," *id.* at 30a-31a. Thus, the court's improper disregard of the district court's findings was a vital element in its decision on the merits.[5]

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position adopted by the agency was contrary even to all of the internal advice received by the General Counsel concerning the technical reasons for treating injection wells in the same manner as recovery wells. *See* C.A. 10494-508, 10682-86, 10771-79.

[5] This problem was compounded by the fact that the court of appeals was focusing on the wrong issue, *i.e.*, the reasonableness of Ruling 1974-29 as a construction of the agency's own regulations rather than the reasonableness of the regulations as a construction of the underlying statutes. *See* Pet. 15-16. To be sure, as the government points out, Br. in Opp. 15 n.18, at the end of its opinion the court added, as an evident afterthought, a reference to the regulations. But the fact remains that whereas in its earlier opinion the court had carefully distinguished the question of the validity of the Ruling from that of the validity of the regulations, *see* Pet. App. F, pp. 209a-210a, in its final opinion the court neglected to draw any such distinction and treated the validity of the Ruling as dispositive, *see* Pet. App. A, pp. 30a-32a.

The government now argues that it really doesn't matter what the facts are because the agency was entitled to construe the statute in order to prevent abuse even if there was no potential for abuse. Br. in Opp. 15-16 n.18. The government rounds off its case by arguing that once an agency construes a statute, even if it does so without informing itself about the facts, its construction is entitled to judicial deference. *Id.* at 14-15. It should be obvious that something has gone wrong here.

The minimum requirement for sustaining an administrative interpretation of a statute should be rationality. If the only rational basis offered by the agency is found to be spurious, it logically follows that the agency's interpretation should be rejected. Any agency can, by receiving comments from interested persons, inform itself on the facts and establish a record of substantial evidence supporting its judgment. But where, as here, the agency chooses to operate in secret, without gathering facts or exposing its decision-making process to the light of day, its rationale must be tested in another forum. If the rationale fails that test, the agency's position should be rejected. A statutory intepretation is not reasonable merely because the agency, in the face of contrary findings of fact, continues to assert that it is. Otherwise, there would be little purpose in judicial review.

Similarly, the minimum requirement for according deference to an administrative interpretation should be a showing that the agency possessed and exercised expertise. In this case, the government should be embarrassed to argue that its interpretation is entitled to "[p]articular weight . . . ." Br. in Opp. 14. It is all too plain that the agency arrived at its position in a careless, slipshod manner. *See* Pet. 5-7, 20-22. There is no purpose in judicial review at all if administrative interpretations of this kind are to be paid uncritical deference by the courts.

3. The government's description of the facts is punctuated by prejudicial misstatements. Because those misstatements

are the foundation for a substantial portion of the government's argument on the merits, correction is necessary.

a. The government attempts to color its case by characterizing injection wells as "non-producing," Br. in Opp. i, and by calling recovery wells "producing wells," *id.* at 4. This is an effort, through innuendo, to draw a distinction that the district court found did not exist in fact. The factual questions at trial largely concerned the ways in which injection and recovery wells resembled and differed from one another. The district court concluded that the distinctions offered by the government were

> . . . distinctions without difference. The engineering contribution of an injection well is undisputed. The water forced into the reservoir, via the injection well, provides energy pressure, displaces crude oil, and forces oil from the reservoir into the well bore of a recovery well. The fact is that but for the injection wells, such crude oil would not have been obtained. It could not be produced under known oil production methods. Whether the oil is brought out of one well bore or a different well bore simply does not matter.

Pet. App. B, p. 102a. The court of appeals did not overturn these findings.

Now, the government seeks to confuse the matter by lumping injection wells together with shut-in wells, salt water disposal wells, water source wells, and observation wells. Br. in Opp. 3 n.2. The district court dealt with this tactic as well:

> No other type of well, however, contributes to the recovery process in the manner that both injection and recovery wells do. These are the only two types of wells which cause oil to flow within the reservoir.

Pet. App. B, pp. 48a-49a. The government's continued insistence that an injection well really is no different from, for example, a water source well simply illustrates that DOE still does not understand production processes in the industry it was supposed to be regulating. The Department of Interior, which has far greater experience and sophistication in these

matters, correctly understands that, unlike the other types of wells indiscriminately listed by the government here, injection wells are structurally identical to recovery wells, they extend physically into the crude oil reservoir, and they are an integral and necessary part of the production of crude oil. *See* Pet. 2-4.

b. In discussing the original enactment of the statutory exemption for stripper properties, the government attempts to give the impression that the congressional conferees instructed the agency to give the exemption a narrow definition. Br. in Opp. 2. The government then reverts to this point in making its argument about legislative intent. *Id.* at 9-10. What the conferees actually said was that they had "added new provisions to insure that the exemption is narrowly defined and prudently administered . . . ." H. R. Rep. No. 624, 93d Cong., 1st Sess. 29 (1973).[6] In other words, Congress thought that, by adding additional provisions, it had taken sufficient action itself to narrow the statutory definition. It was not authorizing the agency to eviscerate the exemption by excluding from the well count wells that were intended to be included.

c. The government incorrectly states that, at the time the exemption for stripper properties was re-enacted in 1976, "Congress specifically rejected attempts to enlarge the exemption in a manner that would have allowed inclusion of injection wells in the well count . . . ." Br. in Opp. 4. The government's invocation of the re-enactment doctrine is centrally based upon this misstatement of the legislative history. *See id.* at 12-13.[7]

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[6] The provisions added by the conferees (1) required that a lease must be operating at the maximum feasible rate of production and in accordance with recognized conservation practices and (2) authorized the agency to conduct on-site inspections. *See* section 406(b) and (c) of the Trans-Alaska Pipeline Authorization Act, 87 Stat. 590 (1973).

[7] The government additionally argues that inquiries made on behalf of constituents by individual congressmen, and a report to a House subcommittee made long before the 1976 legislation was introduced, warrant a presumption "that Congress was aware of the

The government has confused the amendment offered by Senator Bartlett in 1976 with a different amendment he offered in 1977. The amendment offered by Senator Bartlett in 1976 was not concerned with the inclusion or exclusion of injection wells in the well count.[8] Its purpose was to broaden the exemption to cover economically marginal production from properties other than stripper properties. *See* 122 Cong. Rec. 8757 (1976). In rejecting that amendment, the Conference Committee explicitly distinguished such non-stripper marginal production from "stripper well production, for which there is both a long legislative and administrative history . . . ." S. Rep. No. 1119, 94th Cong., 2d Sess. 71 (1976).[9] It was not until more than a year later that Senator Bartlett, acting in light of the agency's administration of the re-enacted exemption for stripper prop-

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interpretation." Br. in Opp. 12. They do not. Such episodic contacts, which took place outside the legislative process leading to re-enactment, do not establish "general awareness on the part of Congress," *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978), and they fall short of "particular consideration of [the Ruling] by Congress during re-enactment." *Rowan Cos.* v. *United States*, 452 U.S. 247, 262 (1981).

[8] At that time, Senator Bartlett presumably shared the illusion, described later by his fellow Oklahoman, Senator Bellmon, that injection wells "would be included [because] [t]he Interior Department has long counted injection wells." 123 Cong. Rec. 36061 (1977).

[9] The "long legislative and administrative history" to which the conferees referred presumably concerned the Department of Interior's administration of the Mineral Land Leasing Act of 1920. *See* pages 2-3, *supra*.

In its argument, the government reveals that it really does understand that the 1976 Bartlett amendment did not relate to stripper properties. *See* Br. in Opp. 13-14. It nevertheless argues that rejection of that amendment evinced a lack of congressional interest in encouraging secondary recovery projects even on stripper properties. *Id.* But it is clear that Congress' action cannot be so read. It was concerned only that a broad exemption not be extended to non-stripper properties.

erties, sought a clarifying amendment requiring the inclusion of injection wells. See 123 Cong. Rec. 36058-63 (1977). Deletion of that post-enactment amendment in conference plainly "has no persuasive significance." *United States* v. *Wise*, 370 U.S. 405, 411 (1962).[10]

4. The government's remaining arguments on the merits are insubstantial.

a. The government can derive no comfort from "[t]he plain words of the statute . . . ." Br. in Opp. 8. The Department of Interior, faced with the same words, had no difficulty in determining that injection wells are to be included. The Department of Interior took the legislative objective into account and applied a functional analysis, looking to the physical relationship of the well to the reservoir and its role in the production of crude oil. In contrast, the agency here ignored the principal legislative objective and applied no analysis at all in reaching its opposite interpretation of the same statutory terms. Whatever else may be said of the two agencies' respective approaches to statutory construction, it is apparent that the reading insisted upon by the government here does not proceed ineluctably from the statutory text.

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[10] At the conclusion of its statement, the government asserts that the court of appeals' finding of a legislative intent to exclude injection wells was "[b]ased on a comprehensive review of the language and legislative history of the stripper well exemption . . . ." Br. in Opp. 6. It was not. The court expressly rested its conclusion about legislative intent upon three equally specious grounds: (1) the assertion that the agency had "applied a single and unequivocal interpretation of the stripping [*sic*] well regulations," Pet. App. A, p. 24a, even though the district court had explicitly found otherwise, *see* Pet. App. B, pp. 64a, 68a; (2) Congress' failure to modify Ruling 1974-29 during reenactment, Pet. App. A, pp. 24a-25a, which is discussed above; and (3) deletion of Senator Bartlett's 1977 amendment by the Conference Committee, *id.* at 25a, which also is discussed above.

b. One aspect of the government's misuse of the legislative history of the original statutory exemption for stripper properties already has been discussed. *See* page 7, *supra*. More generally, it can be seen that the government relies upon a hodge-podge of extracts taken from the conference report. *See* Br. in Opp. 9-11. The short answer to the government's reliance upon these extracts is that that portion of the report was prepared and included at the behest of William N. Walker, then the General Counsel of the Cost of Living Council, and Mr. Walker testified in this case that it was not written with injection wells in mind and was not intended to cause or justify the exclusion of injection wells from the well count. C.A. 8582-83.

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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No. 82-628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ENERGY RESERVES GROUP, INC., et al.,

Petitioners,

v.

JAMES B. EDWARDS, SECRETARY OF ENERGY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Temporary Emergency Court Of Appeals Of The United States

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR CERTIORARI

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On Petition For A Writ Of Certiorari To The Temporary Emergency Court Of Appeals Of The United States

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF INTEREST OF THE STATE OF ILLINOIS

The State of Illinois, the fourth largest consumer in the nation of refined petroleum products, has a significant interest in the outcome of this litigation. Exclusion of injection wells from the stripper well exemption is consistent with the congressional intent that the exemption should be "narrowly defined and prudently administered."

Energy Reserves Group, Inc. v. Dep't of Energy, No. 10-39, 13 (TECA July 29, 1982) (hereinafter "*Energy Reserves II*"). This ensures that Illinois purchasers are not overcharged for crude oil or refined products which originated from domestic crude oil obtained by the use of injection wells.

Under the doctrine of *parens patriae*, the State of Illinois may take legal action to protect the interest of citizens who are unable to act on their own behalf. *See, Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 258 (1972). The Attorney General is the chief law enforcement officer of the State of Illinois and is entrusted with the constitutional duty to represent the interests of its citizens in litigation which may affect those interests. *See, E.P.A v. Pollution Control Bd.*, 69 Ill.2d 394, 372 N.E.2d 50 (1977); *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 359 N.E.2d 149 (1976). Moreover, in an antitrust action against major oil companies the court held that the Attorney General of Florida has the common law powers to represent state citizens, but in addition, in the absence of express legislative restrictions to the contrary, has the power to ". . . institute, defend, or intervene in any litigation . . . which he determines in his sound official discretion involves a legal matter of compelling public interest." *Florida v. Exxon Corp.*, 526 F.2d 266, 271 (5th Cir. 1976), *quoting State ex rel. Shevin v. Yarborough*, 257 So.2d 891, 894 (Fla. 1972).

In addition, the State of Illinois has an interest in the outcome of this litigation because Illinois is a potential recipient of unclaimed funds from the trust fund under court supervision. The United States Department of Energy ("DOE") has recently begun to recognize state governments as the appropriate recipient of unclaimed funds from oil overcharge cases. *See*, Standard Oil Company of

California Consent Order, Case No. RCVA-00001, July 27, 1981, ($25 million); Sohio, Inc., Consent Order, Case No. RSOA-00001, November 2, 1982, ($10 million); and *Office of Enforcement*, 9 DOE ¶82,520 (1982) ("*Alkek*"), *Office of Enforcement*, 9 DOE ¶82,553 (1982) ("*Adams*"), and Office of Special Counsel, Case No. BFF-0007, (August 9, 1982) (Proposed Decision) ("*Amoco*") (*Alkek*, *Adams*, and *Amoco* have been consolidated, amount not yet determined).

DOE has a restitutionary duty to identify overcharged purchasers and reimburse them from the restitutionary funds. *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (TECA 1982). If DOE is unable to determine the purchasers overcharged, state governments are the appropriate institutions for distribution because they can provide a direct benefit to injured purchasers by utilizing unclaimed funds in energy related programs. DOE's Office of Hearings and Appeals has stated that "they [states] would be able to design a distribution scheme for the refund proceeds which would benefit all injured consumers in each state, and account for the varying energy-related needs of their citizens." *Alkek*, *supra*, at 6.

For these reasons, the State of Illinois submits this amicus brief in opposition to the petition for certiorari.

REASONS FOR DENYING THE WRIT

I.

PETITIONER IS COLLATERALLY ESTOPPED FROM RAISING THE ISSUE OF WHETHER AN ADMINISTRATIVE AGENCY'S CONSTRUCTION OF A STATUTE IS ENTITLED TO JUDICIAL DEFERENCE.

Petitioners in the first question presented raise the issue of "whether an administrative agency's construction of a statute is entitled to judicial deference . . .". Petition for Certiorari of Energy Reserves Group, Inc. at i, (hereinafter "Petition").

Under the doctrine of collateral estoppel, petitioners are estopped from raising an issue in which there was a final adjudication between the same parties in a prior proceeding. *Hoag v. State of New Jersey*, 356 U.S. 464, 470 (1958). In *Energy Reserves Group, Inc. v. Dep't of Energy*, 589 F.2d 1082, 1092 (TECA 1978) (hereinafter "*Energy Reserves I*"), the first decision of the Temporary Emergency Court of Appeals ("TECA") between the parties, the court held that:

> (1) Ruling 1974-29 was deemed by FEA to be interpretative. While this characterization by FEA is not controlling, *its interpretation of its statutory mandate is entitled to judicial deference under persuasive authorities and prior rulings of this Court.* (emphasis added) *Southern Union Production Company v. FEA, supra*, 569 F.2d 1147, l.c. 1152 upholding a similar ruling interpreting the statutory stripper well exemption and the stripper well regulation; *Marathon Oil Co. v. FEA* (Em. App. 1976) 547 F.2d 1140, *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed. 2d 378 (1977).

Petitioners did not appeal *Energy Reserves I*. Therefore, the issue of judicial deference with regard to the Federal

Energy Administration's ("FEA") construction of the stripper well exemption is final.

Yet, petitioners attempt to raise this issue before this Court. This Court has held that it lacks jurisdiction to reconsider issues between parties which were "finally disposed of by the decree of the Circuit Court of Appeals . . .". *Farmers' & Mechanics' Nat. Bank v. Wilkinson*, 266 U.S. 503, 506 (1925). Therefore, petitioners are estopped under the doctrine of collateral estoppel from raising the issue of whether FEA had judicial deference since the issue was finally disposed of in *Energy Reserves I.*

II.

THE ISSUES ARE NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

Petitioners and the amicus oil-producing States of Texas, Oklahoma, and Wyoming petition this Court to determine the issue of whether "'injection wells' may be excluded from the calculation of 'average daily production' in applying the statutory exemption from price controls for crude oil produced from properties whose 'average daily production . . . does not exceed ten barrels per well.'" Petition at i. This case presents a question of statutory construction that is not one which requires the exercise of this Court's extraordinary and discretionary jurisdiction because: 1) there is no conflict between the Courts of Appeals; 2) this case should not be accepted for monetary reasons alone; and 3) the argument of the States of Texas, Oklahoma, and Wyoming that State conservation practices will be affected is moot because the crude oil regulations have been abolished.

First, there is no conflict between the Courts of Appeals on the question presented. In *Wiggins Brothers, Inc.*

v. Dep't of Energy, 667 F.2d 77 (TECA 1981), *cert. denied*, 102 S.Ct. 1749 (1982) (hereinafter "*Wiggins*"), the TECA decided a case very similar to this one. In *Wiggins*, the issue was whether injection wells may be counted as "wells that produced oil" under the Marginal Property Rule. The court concluded "that injection wells may not be counted as 'wells that produced oil' in the application of the Marginal Property Rule." *Id.* at 87.

In *Southern Union Production Co. v. FEA*, 569 F.2d 1147 (TECA 1978) (hereinafter "*Southern Union*"), the TECA decided another case similar to this case. One of the issues before the TECA was whether "FEA has acted in excess of its authority, and arbitrarily and capriciously, in excluding gas well condensate from the stripper exemption mandated by the Allocation Act" (citations omitted). *Id.* at 1148. In a per curiam decision by a panel consisting of Judges Christensen, Jameson, and Grant, the court held that "the FEA has not acted arbitrarily or capriciously in denying the exemption to gas well condensate, but rather is making a reasonable, concerted effort to accomplish the purposes intended by Congress." *Id.* at 1152.

In addition, the TECA has held that FEA Ruling 1975-12, which interpreted the stipper well exemption provided in successive statutes and regulations, "was and is a valid interpretative rule entitled to deference by the courts." *Energy Consumers and Producers, Ass'n, Inc. v. Dep't of Energy*, 632 F.2d 129 (TECA 1980), *cert. denied*, 499 U.S. 832 (1980) (hereinafter "*Energy Consumers*").

The decision by the Court of Appeals follows the doctrine already established in *Wiggins*, *Southern Union*, and *Energy Consumers*. These decisions indicate that the TECA has been consistent and correct in deciding cases involving the statutory construction of the stripper

well exemption. Review by this Court is, therefore, unnecessary.

Second, this Court should not accept a case involving statutory construction simply because a large amount of money is at stake for the petroleum industry. In *Commissioner v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151, n.5 (1977) ("substantially more than $100 million is in dispute"), this Court granted certiorari because the "Courts of Appeals have taken varying approaches to this problem." *Id.* at 151. In *United States v. Zazove*, 334 U.S. 602, 613-614, n.17 (1978) (billions of dollars), this Court granted certiorari "to review the important question of statutory construction involved." *Id.* at 605.

Third, the States of Texas, Oklahoma, and Wyoming contend that the decision of the TECA will harm state regulatory schemes which encourage conservation practices. The State of Texas argues that "the decision of the TECA frustrates the State's conservation policies by encouraging earlier shutdown due to economic inviability, thereby promoting waste of this vital natural resource." *See*, Amicus Curiae Brief of the State of Texas at 3. This issue is moot because on January 28, 1981, President Reagan signed Executive Order 12287 which deregulated the remaining crude oil regulations, including the stripper well exemption. In addition, the oil-producing states did not cite any evidence presented before the District Court that oil-producers could not afford to use these wells because injection wells were not exempt from price controls. Furthermore, the existing law had a procedure by which the producer could obtain an exemption for secondary recovery, including injection wells. *Energy Reserves II, supra*, at 23-24.

III.

THE DECISION BELOW GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY.

Petitioners and amicus State of Texas attempt to create the illusion that the TECA failed to consider the proper issues; therefore, petitioners were denied their day in court. The issues decided by the TECA were "whether the district court has correctly construed congressional intent; whether Ruling 1974-29 exceeds the authority of the DOE; and whether Ruling 1979-29 is arbitrary and capricious." *Energy Reserves II, supra,* at 10. These were the issues that the TECA left unresolved after deciding *Energy Reserves I.* Application of these issues to Ruling 1979-29 was crucial because it was the "cornerstone" of the FEA's interpretation of its stripper well exemption regulation. After an exhaustive review of the legislative history of the Trans-Alaska Pipeline Authorization Act, 87 Stat. 590 (1973) and the Emergency Petroleum Allocation Act of 1973, 87 Stat. 628 (1973), the TECA found that Congress intended the stripper well exemption to be limited in order to prevent any "gerrymandering." *Energy Reserves II, supra,* at 25-26. Therefore, the FEA's exclusion of injection wells was "within the scope of congressional intent and agency authority." *Id.* at 26. Moreover, the TECA determined that the FEA's interpretation is neither arbitrary nor capricious because to decide otherwise "would constitute a flagrant disregard of a clear and contrary congressional intention." *Id.* at 35. Therefore, petitioners did receive their day in court because the TECA in *Energy Reserves II* properly defined and decided the issues before it.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 82-628

In the Supreme Court of the United States

OCTOBER TERM, 1982

ENERGY RESERVES GROUP, INC., ET AL.,
Petitioners,

VS.

JAMES B. EDWARDS,
SECRETARY OF ENERGY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals

BRIEF OF THE STATES OF OKLAHOMA AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE STATES OF OKLAHOMA AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The State of Oklahoma is acutely interested in the basic question presented to this Court by the Petition for Writ of Certiorari filed herein, *i.e.*, whether injection wells may be excluded in the determination of an oil property's qualification for the stripper exemption.[1] Oklahoma has enacted a "Gross Production Tax" of "seven percent (7%)

[1] The stripper exemptions are found in the Trans-Alaska Pipeline Authorization Act, Pub.L. No. 93-153, §406, 87 Stat. 584 (1973); The Emergency Petroleum Allocation Act, Pub.L. No. 93-159, §4, 87 Stat. 628 (1973); and the Energy Conservation and Production Act, Pub.L. No. 94-385, §121, 90 Stat. 1125 (1976).

of the gross value of the production of petroleum" within the State. Title 68 O.S. 1981, §1001(b). The amount of tax revenue available for public purposes would be increased or decreased, respectively by the monetary of oil produced within the State. The revenue generated by the gross production tax is used by Oklahoma not only for general revenue fund purposes, but also fund(s) portions of the tax to finance the county highway fund and the local school districts fund(s). Title 68 O.S. 1981, §1004, §1004a. Thus, the State of Oklahoma and each of its citizens have a direct interest in the question before the Court.

The State also has enacted a "Petroleum Excise Tax" of "eighty-five one thousandths of one percent (.085 of 1%) of the gross value on each and every barrel of petroleum oil produced in the State of Oklahoma which is subject to gross production tax." Title 68 O.S. 1981, §1101. Revenues generated by this tax are used to defray expenses of the Conservation Department and the Interstate Oil Compact Fund of Oklahoma. Title 68 O.S. 1981, §1103. Thus, the revenue generated by oil production within the State of Oklahoma provides funds for the continued conservation of the State's natural resources, especially crude oil, and the prevention of physical and economic waste of that vital resource. Title 52 O.S. 1969, §86.2.

Oklahoma is one of the leading petroleum producing states of the nation, and much of the oil production involved in this litigation was produced in Oklahoma. Although precise figures are unavailable, it is conservatively estimated that at least $200 million of the escrowed funds in this case are attributable to Oklahoma production. Therefore, the State of Oklahoma has a direct financial

stake in this litigation of at least $16 million in tax revenues which it will lose unless the Court of Appeals' decision is reversed.

More importantly, however, the State of Oklahoma is deeply concerned by the implications of the Court of Appeals' decision upon its comprehensive regulatory scheme of oil conservation. The decision of the Court of Appeals runs directly counter to conservation practices in the State of Oklahoma which have existed for many years; practices which recognize the absolute necessity of injection wells in waterflood projects and which accordingly give properties with such wells an incentive so as to encourage the maximum recovery of crude oil from the producing reservoirs.

Finally, the decision rests in large part on the Court of Appeals' fear that the counting of injection wells could somehow lead to "abuse". This speculation is merely a red herring, ignoring the comprehensive regulatory scheme which exists in Oklahoma, and all other significant oil producing states, that prevents the very abuse about which the lower court speculated. To allow the decision to stand would implicitly impugn the ability of Oklahoma, as in all other significant oil producing states, to adequately regulate the use of injection wells within the state.

SUMMARY OF ARGUMENT

The Court of Appeals has held that the Department of Energy (DOE) correctly implemented the statutory stripper exemption by excluding injection wells in the determination of an oil producing property's qualification for the exemption. Although the lower court recognized that the primary goal of the exemption was to avoid the premature abandonment of marginal oil wells, thus conserving the nation's domestic oil resources, it raised the spectre of potential "abuse" as a major justification for validating the agency's decision to exclude injection wells in determining a property's qualification for the exemption.

For years the State of Oklahoma has recognized the importance of injection wells in the secondary recovery production of oil by assigning to each injection well an allowable of 45 barrels per day, the same as any other well in the waterflood project. The rationale behind the assignment of an allowable to an injection well is the recognition by the State that by allowing such an incentive the maximum amount of oil can be recovered during a waterflood operation. By the encouragement of secondary recovery operations the state policy engenders conservation of this vital natural resource and the prevention of economic and physical waste. When Congress initially passed the stripper exemption, it *specifically directed* the DOE or its predecessor agencies to take into account state conservation practices in adopting regulations implementing the stripper exemption. One of the primary conservation practices in the State of Oklahoma with regard to injection wells is the assignment of an allowable as above

described. In the implementation of the regulation the DOE completely ignored state conservation practices which have been in existence for many years and instead adopted a policy which runs directly counter to the state policy and to the policy of other federal agencies.

Finally, the Court of Appeals decision rests in large measure on their unsupported fear that if injection wells were counted in determining a property's qualification for the stripper exemption, a great potential for "abuse" would exist and that somehow this would create a loophole in the stripper exemption. However, this unfounded speculation completely ignored the trial court's findings, supported by voluminous evidence, that the drilling and operation of injection wells in oil producing states are highly regulated by state regulatory authorities. The State of Oklahoma regulates the drilling and operation of injection wells to a very high degree, and the Court's assertion otherwise impugns the ability of Oklahoma to regulate adequately the use of such wells.

ARGUMENT

STATE INTERESTS IN THE CONSERVATION OF NATURAL RESOURCES, ESPECIALLY CRUDE OIL RESERVES AND PRODUCTION, AND EXPLICIT CONGRESSIONAL DIRECTION TO THE DOE TO CONSIDER SUCH INTERESTS, HAVE BEEN IGNORED IN THE IMPLEMENTATION OF THE STRIPPER EXEMPTION.

The Court of Appeals has held that the DOE properly implemented the stripper exemption by excluding injection wells from a property's determination of stripper status. Although the court acknowledged that the "paramount sought after result" of the statutory exemption was continued production from marginal properties (Pet. App. A, at 21a), the court speculated that:

> "Including injection wells in the count could possibly lead to a serious abuse of the purposes of the exemption. A lease operator could be encouraged to convert old abandoned wells or to drill additional injection wells to obtain the benefits of the exemption. . . . Ruling 1974-29 eliminates any potential for such abuse. Perhaps it could be considered an extreme measure but it is not arbitrary or capricious."

Id. at 30a-31a.

The unfounded fear of such "potential abuse" permeates the Court of Appeals decision, completely ignores the trial court's findings directly to the contrary, and undoubtedly influenced its decision to exclude injection wells in determining a property's qualification for the exemption. Further, as Petitioners correctly state, the decision below was manifestly erroneous because the Court of Appeals

indulged in speculation outside the record and ignored the trial court's Findings of Fact in violation of the "clearly erroneous" rule of Appellate Review. *See Zenith Corp.* v. *Hazeltine,* 395 U.S. 100, 123 (1969); *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948); Fed.R.Civ.P., Rule 52.

When Congress enacted the first stripper exemption in 1973, it specifically provided:

> "To qualify for the exemption under this section, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices."

Pub.L. 93-153, §406(b), 87 Stat. 584, 590 (1973).

Furthermore, the TAPAA Conference Report, which contains much of the legislative history of the stripper exemption, reveals that Congress expected "the administering agency to utilize state data regarding production volumes" in administering the exemption. H.R. Rep. No. 624, 93d Cong., 1st Sess., *reprinted in* (1973) 2 U.S. Code Cong. & Ad. News 2531, 2532. The DOE totally ignored the "recognized conservation practices" and "state data regarding production volumes" in implementing the statutory exemption.

It is indeed ironic that the Court of Appeals could on the one hand recognize that the stripper exemption was essentially a conservation measure, and on the other hand, could sanction a practice (*i.e.,* the exclusion of injection wells) which runs *directly counter* to the exemption's purpose. The State of Oklahoma, as well as many other oil producing states, has long recognized that in order to conserve crude oil production and reserves, it was in the best

interests of the State to grant allowable incentives to injection wells and thus encourage the maximization of recovery of oil resources.

Since December 17, 1932, Oklahoma has provided an incentive to oil producers to engage in secondary recovery waterflood operations by assigning a production allowable to injection wells. The current regulation on this matter provides as follows:

> "An approved and qualified waterflood project shall be entitled to produce an allowable of forty-five (45) barrels of oil per well per day including producing and injection wells on a project basis upon the acreage developed for waterflooding."

General Rules and Regulations of Oil and Gas Conservation Division of Oklahoma Corporation Commission, §2-240 (c) (3) (hereinafter "OCC Rules and Regs.").

The State of Oklahoma, through the Oil and Gas Conservation Division of the Corporation Commission, regulates the use of injection wells to a high degree. Thus, only upon notice and hearing and a showing that substantial quantities of additional oil can be recovered by the injection of fluid or fluids into the common source of supply will an enhanced recovery (waterflood) project be authorized. OCC Rules and Regs. §2-260. The application for a permit to engage in waterflooding must show, *inter alia:* the location of the injection wells; the casing program for the injection wells; and the type of fluid to be injected, its source, and the amount of fluid to be injected daily. OCC Rules and Regs. §3-301.

Furthermore, each individual injection well is subject to stringent regulations. For example, an injection well

must be completed, equipped, operated, and maintained so as to avoid pollution of fresh water strata and may inject fluids only into those geological formations approved by the Commission. OCC Rules and Regs. §3-112(b). Injection of water must be accomplished through adequate tubing and packers and the wells must be equipped so that the Commission may test the injection pressure at any time. OCC Rules and Regs. §3-112(c). Before an injection well is operated, the casing surrounding the tubing must be pressure tested by the Commission. OCC Rules and Regs. §3-112(d).

A separate application is required for the approval of an injection program. OCC Rules and Regs. §3-113(a). That application must show, *inter alia:* the location of the injection well or wells; a copy of the completion report and electric log if the well has been drilled; a diagram of the well showing its depth, injection intervals, and geological formation to be injected; and casing, tubing, and packer information. OCC Rules and Regs. §3-113(b). Notice of the filing of such an application is published in a newspaper of general circulation in the county where the well is located and if any objections to the injection are filed, a hearing must be held before the Commission. OCC Rules and Regs. §3-113(c) and (d).

In view of the economic and regulatory realities of the drilling and use of injection wells within the State of Oklahoma, as is evidenced by the comprehensive and technical regulatory scheme discussed, it is both legally and factually erroneous that the Court of Appeals premise its decision on the "potential for abuse" of such injection wells. This bold assertion, based upon nothing but the Court of

Appeals speculation and made in the face of overwhelming evidence to the contrary, evidences a lack of understanding of the subject matter of the litigation. Furthermore, such an assertion implicitly impugns this State's ability to enforce its own laws and regulations, which are designed to prohibit the drilling of unnecessary injection wells while assuring that the State obtains the maximum recovery of oil from producing reservoirs within its borders.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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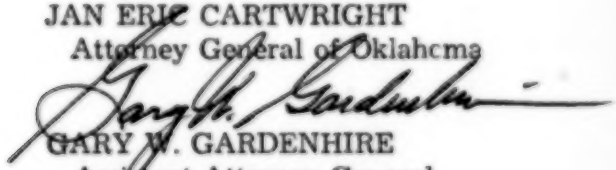

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OF APPEALS OF THE UNITED STATES

AMICUS CURIAE BRIEF
OF THE STATE OF TEXAS

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AMICUS CURIAE BRIEF OF THE STATE OF TEXAS

THE INTEREST OF TEXAS

The State of Texas, as the foremost energy producing state in the nation,[1] is acutely interested in matters affecting the pricing structures of its energy reserves. Texas' interests are multifaceted in this regard, including its interest as royalty owner, as a taxing authority, and as conservator of natural resources.

The inclusion of injection wells in the calculation of "average daily production" would directly affect the amount of revenues generated by the State as a royalty

1. Report of the House Joint Interim Committee on a State Energy Plan, Texas House of Representatives, 66th legis. at 1.

interest owner. Texas is the royalty interest owner in 875,000 acres of land held in fee, 7,000,000 acres of mineral classified lands (retained mineral interest,) 1,000,000 acres of navigatable streams and rivers and 1,500,000 acres of submerged lands in the Gulf of Mexico for a total of 12,875,000 acres. Inclusion of injection wells in the determination of "average daily production" would qualify additional fields for the stripper well exemption and thus remove them to a higher tier pricing structure generating increased revenues to the State of Texas as royalty interest owner. The Temporary Emergency Court of Appeals' (TECA) ruling deprives Texas and her citizens of this revenue, giving them a direct financial stake in this litigation.

Further, the State of Texas as a taxing authority will be substantially affected by the outcome of this litigation. Pursuant to §81.111 of the Texas Natural Resources Code, Texas taxes each barrel of petroleum produced in the State at a rate of 3/16 of one percent. Proceeds of the tax are used for the administration of the State's oil and gas conservation laws.[2] The remainder of the tax generated revenues (a substantial portion) is deposited in the general revenue fund.[3] Thus, again it is apparent that the TECA's finding excluding injection wells in the well count would substantially reduce much needed tax revenues for not only the administration of the conservation laws, but many other general revenue projects as well.

Finally, the State of Texas is acutely interested in protecting and managing the State's resources. Texas has adopted a comprehensive set of statutes providing for the conservation of oil and gas. Prevention of waste is

2. Tex. Nat. Res. Code Ann. §81.113 (1978).

3. Tex. Nat. Res. Code Ann. §81.112 (Supp. 1982).

of primary concern.[4] The State of Texas recognizes the utility of secondary recovery in promoting maximum reservoir recovery. Accordingly, incentives are provided to further such ends.[5] Thus, the decision of the TECA frustrates the State's conservation policies by encouraging earlier shutdown due to economic inviability, thereby promoting waste of this vital natural resource.

SUMMARY OF ARGUMENT

The TECA held that prior decisions have correctly decided that Ruling 1974-29 is a reasonable interpretation of the applicable statutes and regulations. This decision is based on improperly framed issues. The TECA failed to consider whether the regulations enacted pursuant to the statutory mandate are a valid exercise of the agency's power. The district court reviewed substantial amounts of evidence on this point and concluded that the regulations are arbitrary, capricious, and a gross abuse of discretion. The TECA, in ignoring this finding, failed to consider the issues properly before the court thereby resulting in petitioners' loss of an opportunity to be heard on such a crucial issue.

In support of its argument that the agency interpretation is a proper one, the TECA speculated as to possible abuses that the inclusion of injection wells in the well count might have on industry practices. This speculation has no basis in reality. Texas, as well as other major energy producing states, has adopted a comprehensive set of regulations dealing with all phases of hydrocarbon production, including the use of injec-

4. Tex. Nat. Res. Code Ann. §§85.001 et seq. (1978)

5. The rules of the Texas Railroad Commission provide for an increased allowable for successful injection wells. Rule 48, statewide rules, Tex. R.R. Comm'n., Oil & Gas Div.

tion wells in secondary recovery. This stringent regulation combined with cost prohibitive factors makes the TECA's speculation nonsense. Further, the district court specifically found that there is no potential for abuse. The overruling of this specific finding based on unfounded speculation is improper and resulted in direct harm to petitioners.

ARGUMENT

At issue in this litigation are the regulations promulgated pursuant to a statutory mandate to exempt certain crude oil from price controls. The TECA held that the stripper well ruling excluding injection wells from determination of a property's qualification for the exemption is a reasonable interpretation of the regulations and that the stripper well regulations are neither arbitrary nor capricious.

A. THE TEMPORARY EMERGENCY COURT OF APPEALS FAILED TO CONSIDER THE PROPER ISSUE: WHETHER THE REGULATIONS PROMULGATED PURSUANT TO THE STATUTORY AUTHORITY ARE VALID.

The initial phase of this litigation considered the propriety of the procedural aspects of the rulemaking. The question as to whether the regulation from which the ruling was promulgated is valid, was specifically left unanswered by the appellate court. *Duncan v. Theis*, 613 F.2d 305 (T.E.C.A., 1979).

On remand, the district court, after a lengthy analysis, concluded that "the agency's decision to exclude injection wells from the well count for the purposes of determining average daily production was beyond the authority of the agency and was contrary to the intent of Congress." *Energy Reserves Group, Inc. v. DOE*, 520

F.Supp. 1232 (D. Kan. 1981)(*Energy Reserves Group I*). The district court specifically held that Regulation 6 C.F.R. §150.54(s), 38 Fed. Reg. 32484, and subsequent similar regulations were void and of no legal effect.

On appeal, the TECA refused to consider the validity of the regulations. Instead, it once again analyzed Ruling 1974-29. The court's misunderstanding of the issues to be decided could not be any clearer. The major portion of the court's analysis concerns a review of earlier decisions of this case. It is not surprising that the court found that the issues now before it had been previously foreclosed by earlier decisions. *Energy Reserves Group, Inc. v. DOE,* No. 10-39 (T.E.C.A., July 29, 1982). Only by a misunderstanding of the issues could the previous decisions have any application whatsoever. In its earlier opinion denying issuance of a writ of mandamus, the TECA stated:

> Whether the regulation itself was within the authority of the FEA to promulgate, despite its conceded procedural regularity, or whether it was arbitrary or capricious does not so clearly appear from a consideration of the decisions as a whole.

Duncan v. Theis, supra, at 308 (footnote omitted). Thus, it is clear that prior decisions did not address the validity of the regulations. The district court found the regulations to be beyond the authority of the agency. The TECA reversal was based on the wrong issues. Such misapplication of the previous decisions resulted in depriving petitioners' opportunity to be heard on the proper issues.

B. THE STATE OF TEXAS CAREFULLY REGULATES THE USE OF INJECTION WELLS IN SECONDARY RECOVERY.

In furtherance of its argument to support the agency action, the appellate court speculated that inclusion of injection wells in the well count could possibly lead to serious abuses of the exemption. The court envisioned unscrupulous operators drilling additional injection wells in order to qualify the field as a stripper property. It foresaw injection wells springing up all over the country. It is apparent that this rationalization on the court's behalf was a factor in the decision making process and necessarily influenced that decision. This speculation of possible abuse is not based on rational thought, is flatly incorrect, and is directly contrary to the evidence and findings of the lower court. The lower court reviewed a substantial amount of evidence on state regulatory practices in this area, the relative cost of injection wells and the sophistication involved in proper management of a secondary recovery operation. That court heid:

> Because of natural forces, a provision allowing the counting of injection wells has no greater potential for abuse than a provision excluding the counting of injection wells. Likewise, as noted, state oil regulatory practices are designed to prevent industry abuse.

Energy Reserves Group I, supra, at 1264. It is error for the appellate court to override the findings of the district court unless clearly erroneous.

It is clear from the State of Texas regulatory practices that the lower court's finding is not erroneous. Texas has adopted a comprehensive set of regulations to govern the oil and gas industry. Included in these rules and regulations are provisions governing injection wells and secondary recovery. The Texas Railroad Commission (hereinafter "RRC") is empowered to regulate the oil and gas industry and has established specific rules to deal with injection wells. (Statewide rules, R.R.

Comm'n, Oil & Gas Div.) All persons engaged in fluid injection projects are required to obtain a permit from the RRC. (Rule 46(a)). An application is required. (Rule 46(b)). The rules also regulate casing (Rule 46(f)), tubing and packer (Rule 46(g)(1)), and pressure observation valves (Rule 46(g)(2)). The operator of the injection well is required to report annually to the RRC (Rule 46(i)).

Before beginning injection operations, the operator is required to meet minimum pressure tests (Rule 46(j)). Failure to comply with all of the above stringent rules subjects the operator to substantial penalties (Rule 46(l)).

It is indeed incredible that the appellate court could find a potential for abuse in light of the current state practices carefully regulating the use of injection wells. Such a finding flies in the face of reality. The lower court's finding of no potential for abuse, amply supported by evidence, should remain intact.

Further, the State of Texas has been encouraging the use of injection wells in secondary recovery so as to promote maximum hydrocarbon recovery and minimize waste. RRC rules provide for increased allowables for water flood operations. Throughout the course of this practice, Texas has yet to encounter a plethora of injection wells all over the state as envisioned by the TECA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served by certified mail, return receipt requested to all interested parties on this the _____ day of November, 1982.

_____

ANDREW KEVER